COMMON BENCH REPORTS.

CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

HILARY TERM AND VACATION, AND EASTER AND TRINITY TERMS, 1850.

BY

JAMES MANNING, SERJEANT-AT-LAW,

AND

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JUDGES

OF

THE COURT OF COMMON PLEAS

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir THOMAS WILDE, Knt., Ld. Ch. J.
The Hon. Sir WILLIAM HENRY MAULE, Knt.
The Hon. Sir CRESSWELL CRESSWELL, Knt.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir THOMAS NOON TALFOURD, Knt.

Sir JOHN JERVIS, Knt., Attorney-General.
Sir JOHN ROMILLY, Knt., Solicitor-General.

TABLE OF CASES CITED.

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ABRIDGMENTS.

YEAR BOOKS.

RULES OF COURT.

MAXIMS.

MEMORANDA.

In the last Hilary Vacation, the Right Hon. *Thomas* Lord *Denman* resigned the office of Lord Chief Justice of the Court of Queen's Bench.

He was succeeded by the Right Hon. *John* Lord *Campbell,* who took his seat in Court on the first day of Easter Term, having first been called to the degree of Serjeant-at-Law, when he gave rings with the motto "*Justitiæ tenax.*"

In Easter Term last, the following gentlemen were appointed Her Majesty's Counsel learned in the Law: —

Michael Pendergast, of *Lincoln's Inn,* Esq.
Henry Bliss, of the *Inner Temple,* Esq.
Charles Sprengel Greaves, of *Lincoln's Inn,* Esq.
William Charles Townsend, of *Lincoln's Inn,* Esq.
Christopher Argyle Hoggins, of the *Middle Temple,* Esq.
William Carpenter Rowe, of the *Inner Temple,* Esq.
Thomas Colpitts Granger, of the *Inner Temple,* Esq.
Peter Frederic O'Malley, of the *Middle Temple,* Esq.
Barnes Peacock, of the *Inner Temple,* Esq.
Edwin James, of the *Inner Temple,* Esq.
Kenneth Macauley, of the *Inner Temple,* Esq.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO USUALLY SAT *IN BANCO* DURING THIS TERM, WERE — WILDE, C. J., MAULE, J., CRESSWELL, J., WILLIAMS, J.

JONES *v.* How and Another.

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A., upon the marriage of *B.*, his daughter, covenanted with her husband, *C.*, his executors, &c., by deed or will to give, leave, and bequeath unto *B.* one full equal eighth part or share (that being an equal share with his other children,) of all the real and personal estate of which he should die seised or possessed. *B.* died in the life-time of *A.* *A.* having, in his life-time, made some disposition of property in favour of a son, by will devised and bequeathed his real and personal estate for the benefit of his widow and some of his surviving daughters: — Held, that *C.* had not any cause of action against the executors of *A.*

THE following case was sent by Vice-Chancellor *Wigram* for the opinion of this court: —

Previously to, and in contemplation of, a marriage be-

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tween *Frederick Jones* and *Mary Way*, spinster, the daughter of *William Way*, a deed of settlement, bearing date the 8th of *April*, 1826, was made and duly executed between and by the said *Frederick Jones*, of the first part, the said *Mary Way*, of the second part, and the said *William Way* and *William Hearn*, of the third part, by which deed of settlement the said *Frederick Jones* conveyed and assigned certain parts of his real and personal estate to the said *William Way* and *William Hearn*, upon certain trusts for the benefit of himself, the said *Frederick Jones*, and of the said *Mary Way*, and of the issue, if any, of the said intended marriage: and the same deed of settlement contained a certain covenant and agreement on the part of the said *William Way*, the father of the said *Mary Way*, in the words following, that is to say, "And this indenture lastly witnesseth, that, in consideration of the said intended marriage, and also in consideration of the settlement hereby made by the said *Frederick Jones*, he the said *William Way*, for himself, his heirs, executors, and administrators, doth covenant, promise, grant, and agree with and to the said *Frederick Jones*, his executors, administrators, and assigns, that he the said *William Way* shall and will, by deed or writing, or by his last will and testament, give, leave, and bequeath unto the said *Mary Way* one full equal eighth part or share, or such other part as shall be an equal share with all and each of his children and child, of all estates, moneys, real and personal estate, of which he the said *William Way* shall die seised or possessed."

Marriage.

The marriage between the said *Frederick Jones* and the said *Mary Way* was duly had and solemnized, shortly after the execution of the said deed.

At the date of the said deed, and of the said marriage, the said *William Way* had eight children only, and never had any more. Two of the said *William Way*'s

said children died in their father's life-time, without issue, and leaving the said *Mary Way*, then *Mary Jones*, one of the six only children then surviving of the said *William Way*.

Death of *Mary Jones*.

The said *Mary Jones* died in the month of *February*, 1843, also without issue, and in the life-time of her father, the said *William Way*.

After the solemnization of the said marriage, and on the 23rd of *October*, 1831, a paper-writing, bearing that date, and purporting to be the last will and testament of the said *Mary Jones*, wife of the said *Frederick Jones*, was signed, sealed, and published by the said *Mary Jones*, and was attested in such manner as, at the date thereof, was required by law for rendering valid devises of freehold estates; and such paper-writing was in the words following, that is to say:—

Her will.

"This is the last will and testament of me, *Mary Jones*, wife of *Frederick Jones*, of *Arreton*, in the *Isle of Wight*, surgeon, whereby I do give, devise, and bequeath unto my said dear husband, all my right, title, and interest to which I am or may become entitled to, in possession, reversion, or expectancy, under or by virtue of the last will and testament, or writing, deed, or instrument, signed and executed, or to be signed and executed, by my father, *William Way*, of *Newport* and *Wootton*, in the said island, grocer, in my favour, or for my benefit,—to hold to him, my said husband, his heirs, executors, administrators, and assigns, absolutely, and for ever; and I do appoint my said husband sole executor of this my will."

On the 5th of *December*, 1845, letters of administration, with the said paper-writing annexed, of the goods, chattels, and credits which were of the said *Mary Jones*, were granted, by and out of the prerogative court of *Canterbury*, to the said *Frederick Jones*, the sole executor named in the said paper-writing, and, as the lawful

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husband of the said *Mary Jones*, the sole person entitled to her personal estate and effects over which she had no disposing power, and concerning which she was dead intestate.

The said *William Way*, the father of the said *Mary Jones*, never in his life-time did any act by way of performance of the said covenant and agreement, and died in the month of *July*, 1846, leaving issue five children only him surviving; and, by his will, duly executed, and dated the 4th of *April*, 1843, the said *William Way*, after bequeathing certain specific parts of his personal estate to his widow, devised and bequeathed all his real estate, and the residue of his personal estate, to *Thomas How*, and *Alfred Mew*, upon trust, after payment of his debts, for the benefit of his widow and some of his said five surviving children. And the said testator appointed the said *Thomas How* and *Alfred Mew* executors of his said will: but the said testator, *William Way*, did not in his said will mention the said *Mary Jones* and *Frederick Jones*, or either of them, or the said covenant and agreement.

The said *Thomas How* and *Alfred Mew* duly proved the said will in the prerogative court of the Archbishop of *Canterbury*, on the 11th of *August*, 1846.

The said *William Way* died possessed of some personal estate, and also seised of a real estate of copyhold tenure, held of (*a*) a manor in which, by the custom thereof, the father is the customary heir of his daughter who has died without issue.

The questions for the court, are,—

Questions.

First, Whether *Frederick Jones* has, under the above-mentioned circumstances, any good cause of action against the executors of *William Way*; and, if so,—

Secondly, Whether, if *William Way* had died possessed of no personal estate, and seised only of the copy-

(*a*) Meaning "being within," &c.

hold estate above mentioned, *Frederick Jones* could have recovered any substantial damages in such action.

The case was argued in the last *Michaelmas* vacation.

J. Brown, for the plaintiff. (*a*) Covenants such as this are not unfrequently entered into by trades-people, upon the marriage of daughters: and, in equity, questions sometimes arise whether a disposal of his property by the father in his life-time is a fraud upon the covenant. In *Jarman* on Conveyancing (*b*), it is said that covenants of this nature "attach only on that portion of property which the covenantor happens to die possessed of, without interfering with his power of squandering or dissipating it in his life-time, if he chooses.

(*a*) The points marked for argument on the part of the plaintiff, were, —

"That the covenant of *William Way*, made on his daughter's marriage, to give her a share of his property, was absolute, and that the manner of the gift only was optional:

"That the covenantor might have effected the gift by deed, in his daughter's life-time, and was bound to do so, if he did not effect it by will:

"That, if the covenant could be performed in part, though not in all, the covenantor was bound to do it:

"That, if even performance of the covenant became impossible, the covenantor's executors must answer for it in damages:

"That the covenant might have been performed by a bequest to the administrator of the daughter.

"With regard to the damages in respect of the copyhold estate, the plaintiff contends that full damages may be recovered in respect of it; that, if a share in it had been given to the daughter in her life-time, she could have conveyed it to her husband, and would have done so, as appears by her will; that the father might have given the copyhold to one or more of his other children, and personal property, or money, of equal value, to the plaintiff's wife, which would then have come to the plaintiff; that a bequest of a share in the copyhold to the wife's administrator would have satisfied the covenant, and would have carried the whole interest to the plaintiff, and he was entitled to damages commensurate therewith; and that the will of the wife would, in equity, have made the father a trustee for the plaintiff, even if the share of the copyhold given to her had descended, at law, to the father."

(*b*) Vol. IX. p. 113.

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An unequal distribution of property among the children of the covenantor, by his will, to the disadvantage of the covenantee, is the act against which the covenant is immediately directed. The principal point arising on such covenants, has been, whether they admit of gifts to a child taking effect *in the parent's life-time.* In the case of *Jones* v. *Martin*(*a*), Lord *Loughborough* thought that a gift, out and out, might be allowed; but he decided (or, rather, induced the House of Lords to decide,) that a transfer of stock to a child, with an agreement, though oral, that the father should take the dividends during his life, was void, as being designed to elude the covenant. And, even where the covenant was, in terms, confined to such real and personal estate as the covenantor should die seised and possessed of, it was held by Sir *W. Grant*, M.R. (following Lord *Rosslyn's* distinction in *Jones* v. *Martin*), that the covenantor could not defeat it by a gift posthumous in *enjoyment*, though not testamentary, as, by a transfer of stock to trustees, with a declaration of trust for the covenantor for life, and, on his decease, for one of his children: *Fortescue* v. *Hennah.*"(*b*) Lord *Rosslyn*, in *Jones* v. *Martin*, says(*c*): "This covenant was stated by the counsel for the respondent to be vague and idle, unmeaning and insecure. It is not, however, an unusual covenant in settlements. Many marriages are entered into on such covenants: and they are not inexpedient. They are entitled to favourable consideration. Such a covenant holds out a prospect that the party who marries into a family, will continue a member of that family; and it provides, as it were, a pledge that he shall be considered, and may consider himself, part of such family, till the death of the person who enters into the covenant. But, then, it

(*a*) 3 *Anst.* 882.; more fully, 5 *Ves.* 266, n.

(*b*) 19 *Ves.* 67.

(*c*) 5 *Ves.* 268, n.

does not confine or restrict the father's powers. He may alter the nature of his property from personal to real; or he may give scope to projects; or indulge in a free and unlimited expense. But he must not be allowed to entertain more partial inclinations and dispositions towards one child more than another. If his partiality does rise so high, and he *will* make a difference, he must do it directly, absolutely, and by an unqualified gift, surrendering all his own right and interest. He must give out and out. He must not, however, exercise his power by an act which is to take effect, not against his own interest, but only at a time when his own interest will cease." [*Maule*, J. You treat this covenant as an insurance upon the wife's life?] The covenantor must answer in damages. [*Maule* J. In the event that has happened, nothing that the father could do, would relieve him from an action for a breach of covenant. If he had left his whole estate to the husband, or to the daughter's children, even that would have been no performance of the covenant.] He is, in effect, an insurer. Marriage and the birth of children was contemplated; and the intention of the covenant was, to make provision for such issue, as well as for the covenantor's daughter. The covenant is in the alternative,—to make the provision by *deed* or *will:* the covenant itself being absolute; the mode of performance only conditional. *Laughter*'s case (*a*),—where it was laid down, that, where the condition of a bond consists of two parts, in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible, by the act of God, the obligor is not bound to perform the other part, — has been distinctly overruled by the authorities cited in Mr. *Fraser*'s note A.—" In *Stud-*

(*a*) 5 *Co. Rep.* 21. b.; *S. C. per nom. Eaton* and *Monox* v. *Laughter*, *Cro. Eliz.* 398.; *S. C. per nom. Eaton*'s case, *F. Moore*, 357.; *S. C. per nom. Eton* and *Monney* v. *Laughter*, *Poph.* 98.

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holmes v. *Mandell* (*a*), the court said that the rule and reason of *Laughter*'s case ought not to be taken so largely as *Coke* has reported it, but according to the nature of the case: and *Treby*, C. J., puts this case, — *A.*, in consideration of 500*l.*, bound himself in a bond, with condition either to make a lease for the life of the obligee before such a day, or to pay him 100*l.* The obligee died before the day, yet, in the time when *St. John* was chief justice of C. B., it was adjudged that the obligor should pay the 100*l.*; and *St. John* there declared that he knew well some of the judges who gave the resolution in *Laughter*'s case, and that they denied that they laid down such a rule as *Coke* has reported; yet the whole court held that the principal case of *Laughter* was good law. *Vide* S. C., somewhat differently reported, *Lutw.* fo. 693. The reporter observes that the case put by *Treby* seems to be indistinguishable in reason from *Laughter*'s case. So, also, in *Drummond* v. *The Duke of Bolton* (*b*), the court said that the doctrine in *Laughter*'s case, which does not appear to be laid down by the court, but to be the reason given by the reporter for the judgment of the court, is laid down too largely. And, in *Da Costa* v. *Davis* (*c*), it seems to have been taken for granted that the impossibility of performing one condition, is no excuse for not performing the other. And *vide* the *dictum* of *Walmsley*, *More* v. *Morecomb* (*d*), which seems *contrà* to *Laughter*'s case: and, note, in the case of an award, where one of two matters is awarded in the disjunctive, and one alternative is impossible or uncertain, that alternative must be taken which can be performed: *Simmonds* v. *Swaine.*" (*e*) *Wood* v. *Bate* (*g*) and *Eaton* v. *Butter* (*h*), so far as it is practicable to decipher

(*a*) 1 *Ld. Raym.* 279., 1 *Lutwyche*, 688.
(*b*) *Sayer*, 243.
(*c*) 1 *B. & P.* 242.
(*d*) *Cro. Eliz.* 864., *F. Moore*, 645.
(*e*) 1 *Taunt.* 549.
(*g*) *Palmer*, 513.
(*h*) *Palmer*, 552.

them, seem to be inconsistent with the ruling in *Laughter's* case. In *Prebble* v. *Boghurst* (*a*), a bond recited a marriage intended, and the wife's present and expectant property, and that, in consideration thereof, and of love, and to make a provision for the wife and the issue of the marriage, in case it should take effect, the husband had agreed to pay a sum to trustees, and also had agreed, that, if at any time during his natural life he should be seised of any hereditaments in possession, he would, by such conveyances as counsel should advise, settle the same on the wife and the issue of the marriage, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her, in case she should survive; and the condition was, for payment of the sum to trustees, and also that, if the obligor should, during life, become seised of hereditaments, he should settle the same upon the wife and the issue of the marriage, as counsel should advise, in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for her, in case she should survive the obligor: the husband had issue, survived the wife, and afterwards acquired lands, but made no settlement thereof on the issue: — this court held that the bond was not forfeited; but that decision was afterwards overruled by Lord *Eldon*, assisted by *Richards*, C. B., and *Abbott*, J. (*b*) There are many authorities to shew that the circumstance of one alternative becoming impossible, whether by the act of God, or otherwise, will not relieve the covenantor from the performance of the other. [*Maule*, J. A man may, if he chooses, covenant that it shall or shall not rain to-morrow. (*c*)] In that

(*a*) 7 *Taunt.* 538., 1 *J. B. Moore*, 258.

(*b*) See *Prebble* v. *Boghurst*, 1 *Swanst.* 309.

(*c*) See *Com. Dig. Condition* (D. 2.), Citing 1 *Roll. Abr.* 420 (D), pl. 1.; 5 *Vin. Abr.* 111 (D.a.) pl. 1., which refers to 22 *E.* 4, 26. (Sir *James Harrington's* case, *M.* 22 *E.* 4, fo. 24, pl. 3.), where this was said *obiter* by *Brian, C. J.* of *C. P.*

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case he is an insurer, and shall answer in damages. In *Da Costa* v. *Davis*, it was held, that, where the condition of a bond is, to do one of two things, shewing that one could not be performed, is no good reason for not having performed the other. The like was held by *Parke*, B., in *Stevens* v. *Webb*. (*a*) In that case, *A.* was in custody on a *ca. sa.*, and, in consideration of the plaintiff's consenting to his discharge, *B.* agreed to pay 35*l.*, or to surrender *A.* to the sheriff: *A.* on a subsequent day offered to surrender himself to the sheriff, who would not re-take him, as the plaintiff had consented to his discharge: and the learned baron ruled that the agreement was absolute for the payment of the 35*l.*, and that the other alternative was not satisfied by the offer of the surrender. [*Maule*, J. There cannot be a stronger illustration of the principle, than the case of a covenant that a thing is in a given condition,—for instance, that a horse is sound.] Where a man covenants absolutely that he is seised in fee-simple, he is answerable in damages if his title turns out to be defective. [*Maule*, J. So, where one covenanted to enfeoff *J. S.*, and *J. S.* refused to come and be enfeoffed, it was held that the covenantor was bound to make him.] In *Lee* v. *Garret* (*b*), in debt on a bond conditioned to pay 500*l.* to the administrator of the obligee within two months after his death,—a plea that he was ready to pay it, but that no administrator was appointed, without saying *uncore prist*, was held bad. [*Maule*, J. Covenants containing conditions are not so much objects of compassion now as they were formerly.] In *Comyns*'s Digest, *Condition* (D. 1.), it is said (*c*), that, "if a man covenants or promises to do a certain thing at a certain time, and it becomes impossible, by the act of God, he

(*a*) 7 *C. & P.* 60.
(*b*) 2 *Show.* 143.
(*c*) Citing 1 *Roll. Abr.* 450, l. 20. (5 *Vin. Abr.* 229, pl. 8.)

shall not be excused." Again, title *Action upon the Case upon Assumpsit* (G.), it is laid down, that, "if a man undertake to build a house before such a day, and afterwards a plague happens, and continues till the day, he shall be excused by this necessity for not doing it at the day, if he build it afterwards; for, he is not obliged to hazard his life (*a*): but, if the thing promised become afterwards impossible by the act of God, that does not excuse him; for, he took upon himself to do it. (*b*) And in a note to that passage is added the following,—"If performance of a contract becomes impracticable through the act of God, and there is no provision therein exonerating the contractor from performance, under such circumstances, he must answer for the breach of it in damages: *Shubrick* v. *Salmond.* (*c*) Thus, a freighter who covenants generally to load a cargo, and is prevented so doing by the prevalence of the plague, is liable on his covenant: *Barker* v. *Hodgson.* (*d*) There is no implied exception of loss or destruction by act of God, in a continuing contract; such as, to repair a bridge during a certain time, unless the contract cannot afterwards be fulfilled: *The Brecknock and Abergavenny Canal Navigation* v. *Pritchard.*" (*e*) Suppose a man covenants to pay money on a given day, and before the day arrives he becomes lunatic, he still remains liable on his covenant. So, a lessee of a house who covenants generally to repair it, is bound to rebuild it, if it be burnt by an accidental fire: *Bullock* v. *Dommitt.* (*g*) That is substantially *Paradine* v. *Jane* (*h*) over again. There, in debt for arrears of rent due upon a lease, the defendant pleaded, that a certain German

(*a*) Citing 1 *Roll. Abr.* 450, l. 30. (5 *Vin. Abr.* 229, pl. 10.)

(*b*) Citing 1 *Roll. Abr.* 450, l. 20. 25. (5 *Vin. Abr.* 228, pl. 8.)

(*c*) 3 *Burr.* 1637.

(*d*) 3 *M. & Selw.* 267.

(*e*) 6 *T. R.* 750.

(*g*) 6 *T. R.* 650. And see *Weigell* v. *Waters*, 6 *T. R.* 488., *Waters* v. *Weigell*, 2 *Anstr.* 575.

(*h*) *Aleyn*, 26.

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prince, by name Prince *Rupert*, an alien born, enemy to the King and kingdom, had invaded the realm with a hostile army of men, and, with the same force, did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 *July*, 18 *Car.*, till the feast of the *Annunciation*, 21 *Car.*, whereby he could not take the profits: and it was resolved that the plea was insufficient; the court saying: "He hath not averred that the army were all aliens, which shall not be intended; and then he hath his remedy against them. That the matter of the plea was insufficient; for, though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that, where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; as, in the case of waste,—if a house be destroyed by tempest, or by enemies, the lessee is excused: *Dyer*, 33. a.; 1 *Inst.* 53. b., 283. a.; 11 *H.* 4. 6. (*a*) So, of an escape: *Co.* 4. 84. b. So, in 9 *E.* 3. 16. (*b*), a *supersedeas* was awarded to the justices, that they should not proceed in a *cessavit*, upon a cesser during the war. But, when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. *Dyer*, 33. a.; 40 *E.* 3. 6." (*c*) In *Atkinson* v. *Ritchie* (*d*), the owner of a vessel was held liable for sailing without a full cargo, pursuant to charter,

(*a*) *M.* 12 *H.* 4, fo. 6, pl. 11.: and see Earl of *Arundel*'s case, *M.* 11 *H.* 4, fo. 32, pl. 59.

(*b*) *P.* 9 *E.* 3, fo. 16, pl. 30. That was not the case of a supersedeas, but of a prohibition to sue, which the judge disregarded.

(*c*) *H.* 40 *E.* 3, fo. 6, pl. 11.

(*d*) 10 *East*, 530.

though the jury found that the master acted *bonâ fide*, under a reasonable and well-founded apprehension of a hostile embargo. Lord *Ellenborough* there said (*a*): "No exception (of a private nature, at least,) which is not contained in the contract itself, can be engrafted upon it, by implication, as an excuse for its non-performance. The rule laid down in the case of *Paradine* v. *Jane* has been often recognised in courts of law as a sound one, *i. e.* that, 'when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.' And this has been recognised in several cases, as, in *Bullock* v. *Dommitt*, and *The Company of Proprietors of the Brecknock-and-Abergavenny-Canal-Navigation* v. *Pritchard*. (*b*)

With respect to the copyhold, the argument on the other side will be, that the interest of the wife therein would have gone to her father, and therefore that no damages could have resulted from the breach of covenant. But the wife might have surrendered to the use of her husband, and such surrender would have been valid: *Scamon* v. *Maw* (*c*): the statute 3 & 4 *W.* 4. *c.* 74. *s.* 77. expressly reserves that power to the wife.

Crompton, for the defendants. The covenant in question was intended only to take effect in the event of the daughter surviving her father. [*Maule*, J. Even in the case of the daughter leaving issue?] Yes. [*Maule*, J. If the substantial meaning of the covenant is, that the contemplated provision shall be made by will, and it would be well performed by the father's bequeathing an equal share of his property to his

(*a*) 10 *East*. 533.

(*b*) And see *Chitty on Contracts*, 4th edit., by *Russell*, p. 930.

(*c*) 3 *Bingh*. 378., 11 *J. B. Moore*, 243.

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daughter, and she died before him, no mischief is done.] Exactly so. The substantial meaning of the covenant, is, that the daughter shall, at the death of her father, provided she be then living, have an equal share of his property with the other children who shall then be living, This could only be carried into effect by a testamentary instrument. It would be impossible to convey by deed an equal share of goods or estate which the father should be possessed of at the time of his death,—which is the time at which the covenant was to operate. It was clearly not the intention of the parties that any *present* interest should pass: nor was it intended to tie up the property. [*Maule*, J. Would the father's conveying to his daughter, in his life-time, a valuable freehold estate, be a performance of the covenant?] Clearly not: it would be a breach of the contract, as to the rest of the children. The covenantor could not, by any instrument made in his life-time, perform this covenant; the subject-matter not being ascertainable till his death: *Lunn* v. *Thornton.* (*a*) In *Needham* v. *Kirkman* (*b*), where *A.*, being seised of certain real estates, conveyed part of them to the uses of the settlement at the time of his second marriage, and also covenanted with the trustees, that he would, by will or otherwise, give and devise all other his real estates, and also his personal estate, to and amongst the children both of his first and second marriage, share and share alike,—it was held that this covenant was applicable only to such real and personal estate of which *A.* might die seised or possessed, and that it did not prevent him from disposing freely, during his life, of such part of his real estate as was not settled, or which he might acquire subsequently to the settlement. In *Fortescue* v. *Hennah* (*c*), a deed of this

(*a*) *Antè*, Vol. I. p. 379.
(*b*) 3 *B. & Ald.* 531.
(*c*) 19 *Ves.* 67.

sort was looked upon as a testamentary paper. It was there held, that a father under covenant for an equal division, at his death, of all the property he shall die seised or possessed of, between his two daughters, or their families, cannot defeat the covenant by a disposition in effect testamentary, — as by reserving to himself an interest for life. In the course of the argument in that case, it was said, that, according to the principles established by *Randall* v. *Willis* (*a*), *Jones* v. *Martin* (*b*), and *Lewis* v. *Madocks* (*c*), "a father under such a covenant, though he has the liberty of disposition during his life, cannot stipulate for his own benefit, and, reserving an interest for his own life, make an unequal distribution, in effect, though not in form, testamentary. If he will be partial, he must be partial against himself." But Sir *W. Grant*, M. R., said: "*Robert Hickes* having covenanted that his eldest daughter and her first husband, and her children by him, should, at the death of *Robert Hickes*, have a full moiety of all the real and personal estate of which he should die seised or possessed, it is clear that he could not defeat the effect of that covenant by any testamentary act. The question is, whether he could defeat it by acts which, though not strictly testamentary, were not to take effect until after his death. It is evident that such a covenant has little value, if its effect is to depend on the form of the instrument. Against a diminution of his property by absolute gift during his life-time, his own interest and convenience form a pretty good security: not so, where, without any diminution of his own enjoyment, he exercises a mere post-

(*a*) 5 *Ves.* 262; and see the American cases, *Garner* v. *Garner's* executor, 1 *Desaus' Chanc. Rep.* 437; *Tabb* v. *Archer*, 3 *Hen. & Munf.* 399; *Roane's* executor v. *Hern*, 1 *Wash*, 47; *Fleming* v. *Willis*, 2 *Call.* 5.

(*b*) 3 *Anstr.* 882., 5 *Ves.* 266, n.

(*c*) 8 *Ves.* 150.

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humous bounty, though by an irrevocable instrument. It seems to me that the spirit of such a covenant requires that every disposition should be excluded, which is in its effect testamentary, though not such in point of form." Here, the father never intended to put it in his daughter's power to give the property to her husband. [*Williams*, J. Leaving the share to her child, would not, according to Mr. *Brown*'s argument, satisfy the covenant.] The language of the second branch of *Laughter*'s case is precisely like that of this covenant: and that part of the case has never been found fault with. The same account of the reasons for the decision is given in *Croke* and in *Moore*, as that given by Sir *Edward Coke:* and it is undoubtedly good law. Where there is an absolute option, it cannot be taken away by the act of God. [*Williams*, J. *Laughter*'s case is cited in *Sheppard*'s Touchstone without any remark.] At p. 173. of that book, it is said, that, "if one covenant to leave a wood in the same plight as he finds it, and he cut down trees; in this case, the covenant is broken presently; for, it is now become impossible to be performed, by his own act: but, if in this case, some of the trees be blown down with the wind, or the like, by this [act of God] the covenant is not broken; for, it is now become impossible to be done, by the act of God, and in this case the covenantor is not bound to supply it." Again, at p. 382, "When the condition of an obligation is, to do [one of] two things by a day, and, at the time of making the obligation, both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible, by the act of God, or by the sole act and laches of the obligee himself; in this case, the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But, if, at the time of the making of the obligation, one of the things is, and the

other of the things is not possible to be done, he must perform that which is possible. And if, in the first case, one of the things become impossible afterwards by the act of the obligor, or a stranger, the obligor must see that he do the other thing, at his peril. And, when the condition of an obligation is, to do one single thing, which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet, if it be possible to be done in any part, it shall be performed as near to the condition as may be." *Studholmes* v. *Mandell* is also reported in *Nelson*'s edition of *Lutwyche*, where the learned editor, speaking of *Laughter*'s case, says (*a*): "'Tis true, Justice *Croke* tells us that *Gawdy* held the bond was not discharged, but that the husband ought to purchase lands for the heirs of the wife, because he was obliged to do so by the condition, and had time, during his life, to perform it; and that the word *heirs* in that place was not a word of limitation, but of purchase: but either he or my Lord *Coke* must be mistaken; for, *Coke* tells us judgment was given for the defendant, by *Popham*, C. J., and *the whole court*,—which could not be, if *Gawdy*, who was then a judge of that court, dissented. However, we having the concurrent testimony of my Lord *Coke*, *Croke*, and *Moore*, of whom two were afterwards judges, and one of them of counsel in the cause, I think we are rather to believe what they have written, than what the chief justice had by tradition. But I have this to object against that opinion of *Gawdy*, that I take it to be of no great weight, because he was of a contrary opinion in the very same term, in a like case between other parties; for, in *Gremingham* and *Ewre*'s case(*b*), he laid it down for a rule, that, where a condition is in the disjunctive,

(*a*) Page 215. (*b*) *Cro. Eliz.* 396.

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and one part of it becomes impossible to be performed, by the act of the obligee himself, there the obligor is discharged from the other part; and his reason is, because in such case the obligor hath his choice to do either, and, being deprived of that choice by the obligee himself, therefore he shall do neither. Now, if this is law, what reason can be given why the act of God should not work a discharge, as well as the act of the party?" *Drummond* v. *The Duke of Bolton* has no application: and there is nothing in the cases of *Wood* v. *Bate* and *Eaton* v. *Butter*, to justify the suggestion that they are at variance with *Laughter*'s case. In *Com.* Dig. *Covenant* (F.), (*a*) it is said,—"If tenant for life, or in tail, leases for twenty years, and covenants by *demisi*, and dies within the term, covenant does not lie." That case is analogous to the present. There, as here, the subject-matter of the covenant was gone. So in *Bac.* Abr. *Conditions* (Q.), (*b*) it is said,—"Regularly, if a condition which was possible at the making thereof, becomes impossible, by the act of God, the obligation is discharged." There being no words of limitation here, the provision for the wife would be limited to her life, and, if so, the husband has lost nothing.

The second question, it is submitted, should, like the first, be answered in the negative: for, the court will not assume that the covenantor's daughter would have disinherited her heir, *viz.* her father; and, consequently, they cannot say that the plaintiff has sustained any damage at all.

Brown was heard in reply.

(*a*) Citing *Cheiny* and *Langley*'s case, 1 *Leon.* 179.

(*b*) Citing 1 *Roll. Abr.* 449. (*Vin. Abr. Condition* (G. c.) Vol. 5. p. 227); *Co. Litt.* 206. a; *Anon. F. Moore*, 124; *Pet* and *Cally*'s case, 1 *Leon.* 304.

The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us by counsel; and we are of opinion,—first, that *Frederick Jones* has not any good cause of action,—secondly, that, in the event supposed, *Frederick Jones* could not have recovered any substantial damages in such action."

"W. H. MAULE.
"C. CRESSWELL.
"E. V. WILLIAMS."(*a*)

(*a*) When the case afterwards came before Vice Chancellor *Wigram*, his Honour said (7 *Hare*, 267).—"In this case, I am not assisted by knowing the reasons of the judges of the court of Common Pleas: but I understand from counsel, that they considered the case by analogy to the reasoning of the court in *Laughter's* case. The covenantor in this case, has reserved to himself the privilege of not making the stipulated provision during his life; and the provision by will, it is said, has failed, not by his act or omission, but by the default of the legatee in his life-time. There cannot, I think, be any doubt that the intention of the parties is disappointed by this decision. Where a parent, on the marriage of a child, covenants to make for that child a provision by deed or will, it cannot be doubted that the provision is intended to be absolute, and that the mode of making it alone is intended to be left to the discretion of the covenantor. And a doubt crossed my mind, of this nature,—If the will of the covenantor had contained a provision in favour of the lady, and she had left issue living at her death, the new will-act would have prevented a lapse; and a doubt occurred to me whether the covenantor might not have made a will so as to have preserved to the lady the benefit of the covenant, notwithstanding her death in his life-time,—whether, in fact, he might not, by will, have done for her (dying without issue) that which the will-act would have done for her if she had left issue living at her death. I do not know whether this point was suggested in argument before the court of Common Pleas: but I do not feel such confidence in the point as to make it proper to send the case a second time to law. I shall confirm the certificate."

HOARE *v.* SILVERLOCK.

Jan. 11.

It is a good defence to an action for a libel, that it consists of a fair and impartial (though not *verbatim*) report of a trial in a court of justice; and such defence is admissible under not guilty, which puts in issue as well the lawfulness of the occasion of the publication, as the tendency of the alleged libel.

THIS was an action upon the case for a libel. The alleged libel consisted of a report of the trial of a case of *Hoare* v. *Dickson*, also for a libel, which took place at the *Croydon* summer assises, 1847.

The defendant pleaded not guilty.

The cause was tried before *Wilde*, C. J., at the sittings at *Westminster*, after the last term. The plaintiff proved the publication of the alleged libel, and also that the defendant was the editor of the newspaper in which it appeared.

On the part of the defendant, it was proposed to give in evidence certain letters which had been produced at the trial of the cause of *Hoare* v. *Dickson* for the purpose of shewing that the then defendant, in communicating their contents to a benevolent society of which he was the secretary, had acted *bonâ fide* in the discharge of his duty; and it was further proposed to call witnesses to prove that the report in question, though not a *verbatim* report of what took place at the former trial, was a fair and substantially correct report.

On the part of the plaintiff, it was objected that the evidence so proposed to be given was not admissible, — at all events under the general issue; for that, however necessary the letters might have been for *Dickson*'s justification, the present defendant was not justified in giving them publicity, or in publishing a garbled statement of what passed in court.

The objection was overruled, and the evidence ad-

mitted: and his lordship, in submitting the case to the jury, told them that they must find for the defendant, if they were satisfied that the publication complained of was no more than a fair and *bonâ fide* report of the trial at *Croydon*.

The jury accordingly returned a verdict for the defendant.

S. Carter, for the plaintiff, now moved for a new trial, on the ground of misreception of evidence, misdirection, that the verdict was against evidence, and on the ground of the absence of a material witness. The letters produced on the trial of the case of *Hoare* v. *Dickson*, were clearly not admissible in this case. [*Wilde*, C. J. They were produced and read for the purpose of shewing that the statement of them in the alleged libel, was a fair and accurate statement of their purport. *Maule*, J. They formed a portion of the defendant's evidence that his report was a fair one.] At all events, the matter should have been pleaded specially, in order that the plaintiff might have an opportunity to meet it. *Curry* v. *Walter* (*a*) is apparently an authority against the plaintiff. It was there held, that an action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication may be to the character of an individual: but, "some doubts being entertained upon the bench, whether the matter of justification ought not to have been pleaded, the case stood over; *and no judgment was ever given.*" It is submitted that those doubts were well founded. And in all the subsequent cases it will be found that the matter *was* specially pleaded:

(*a*) 1 *Bos. & Pull.* 525.

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see *Lake* v. *King* (*a*); *Astley* v. *Younge* (*b*); *Stiles* v. *Nokes* (*c*); *Lewis* v. *Walter* (*d*); *M'Gregor* v. *Thwaites* (*e*); *Duncan* v. *Thwaites* (*g*); *Flint* v. *Pike* (*h*); *Stockdale* v. *Hansard.* (*i*) Many things are privileged when spoken, though defamatory of individuals, the publication of which in a written or printed form, might be made the subject of an indictment or of an action for damages: *The King* v. *Creevey* (*k*); *The King* v. Lord *Abingdon* (*l*); *The King* v. *Mary Carlile.* (*m*) It is no part of the duty of a newspaper editor to publish proceedings in a court of justice: he is a mere volunteer. The observations of Lord *Ellenborough*, in *Rex* v. *Fisher* (*n*), evidently shew that there was no disposition in that learned judge to allow any great latitude in cases of this sort to defendants.

As to the alleged surprise, — the absence of the witness, — the affidavit was defective.

MAULE, J. Several points have been urged in this case. One is, that the plaintiff was surprised by the absence of a witness upon whose testimony he mainly relied. Surprise is a matter extrinsic to the record and the judge's notes, and consequently can only be made to appear by affidavit: and here we have no affidavit of surprise, in the sense required by the practice of the court. That ground, therefore, fails.

The next question is, whether certain evidence which was offered on the part of the defendant, was admissible

(*a*) 1 *Wms. Saund.* 131 *b.*
(*b*) 2 *Burr.* 807.
(*c*) 7 *East*, 493. *S. C. per nom. Carr* v. *Jones*, 3 *J. P. Smith*, 491.
(*d*) 4 *B. & Ald.* 605.
(*e*) 3 *B. & C.* 24., 4 *D. & R.* 695.
(*g*) 3 *B. & C.* 556., 5 *D. & R.* 447.
(*h*) 4 *B. & C.* 473., 6 *D. & R.* 528.
(*i*) 9 *Ad. & E.* 1., 2 *P. & D.* 1.
(*k*) 1 *M. & Selw.* 273.
(*l*) 1 *Esp. N. P. C.* 226.
(*m*) 3 *B. & Ald.* 167.
(*n*) 2 *Campb.* 563.

under not guilty. That evidence was of this nature, — having a tendency to shew that the alleged libellous matter was published upon an occasion which justified the publication of that which might be injurious to the character of a third person. Now, evidence of that sort, — which is comprised within the class of privileged communications, — has always been held to be admissible under not guilty. It shews that the publication was not malicious: and not guilty denies the allegation of malice in the declaration. I do not mean to say that such matter may not also be pleaded specially: it does not follow, that, because it may be given in evidence under not guilty, it may not be specially pleaded.

The defence relied on, was, that the publication complained of, was a true and *bonâ fide* account of what took place at the trial at *Croydon*, in 1847. The evidence which was objected to, clearly had a tendency to shew that. The question now raised, is, whether, assuming the report to be a fair and *bonâ fide* one, that affords any defence. I think it is impossible at this day to say that a fair account of proceedings in a court of justice, not being *ex parte*, but in the hearing of both sides, is not, generally speaking, a justifiable publication. I do not lay it down as an universal proposition. Matters may appear in a court of justice, that may have so immoral a tendency, or be so injurious to the character of an individual, that their publication could not be tolerated. But, as a general rule, it may be assumed that the publication of a fair account of what passes in a court of justice, not *ex parte*, is justifiable, — unless there be something to take it out of that rule. There is nothing to take this case out of that general rule. The cases cited all apply either to *ex parte* proceedings, or where there is some special reason against the application of the general principle. Upon the whole, I am of opinion that there ought to be no rule.

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CRESSWELL, J. concurred.

WILLIAMS, J. I also am of opinion that there should be no rule in this case. I understand the question upon the first count to be, whether the lord chief justice was right in leaving it to the jury to say whether the matter complained of was a fair account of what took place at the trial at *Croydon*, and in telling them, that, if they were of opinion that it was, their verdict must be for the defendant. The objection urged, is, — first, that, assuming that to be so, it afforded no defence, — and, secondly, if it did afford a defence, that it was not admissible under not guilty. Before the new rules of pleading, it is clear, the defendant had the option of pleading matter of this sort specially, or of giving it in evidence under not guilty. And the new rules have made no difference in this respect. In *Cotton* v. *Browne* (*a*), it was held, that, in an action for maliciously indicting the plaintiff, without probable cause, the defendant may give evidence of probable cause under not guilty; and that, if, in addition to the plea of not guilty, he pleads specially that he had probable cause, the court will order such plea to be struck out. Lord *Denman* there says: "The injury complained of in this action, is, not merely in the indicting, nor in the indictment being wrongful, but in maliciously indicting, and in doing so without reasonable or probable cause. The plea of not guilty is sufficient." So, here, not guilty puts in issue, not merely the publication of the alleged libel, but also the maliciously doing it. Then, does the fact of the matter complained of being a fair and *bonâ fide* account of what took place in a court of justice, afford a defence? Subject to certain qualifications, there is no doubt that it does

(*a*) 3 *Ad. & E.* 312., 4 *N. & M.* 831.

afford a defence. The only difficulty I have felt has been in ascertaining the fact. It seems to me that this case is not affected by any of the qualifications adverted to. I assume that the publication complained of was of the *whole* of the proceedings, — not the substance merely; and I also take it for granted that there were no defamatory remarks of the writer's own added to it. I therefore think that the direction was correct, and that there is no foundation for the motion.

WILDE, C. J. The rule is moved principally on the ground of misdirection, in the reception and leaving to the jury, under not guilty, evidence which it is said was inadmissible unless the matter was specially pleaded: and it is further contended that the publication of a fair account of proceedings which take place in a court of justice, is not justifiable, if it reflects upon the character of an individual. It is not suggested that the alleged libel was not a fair account of what took place at the trial of the cause of *Hoare* v. *Dickson*, at *Croydon;* nor was there any evidence given to impugn its accuracy. I see no reason, therefore, for finding fault with the conclusion the jury came to. The giving publicity to the proceedings of courts of justice, subject to certain exceptions, is justifiable; and there is nothing in this case to bring it within any of the exceptions. My brother *Shee* opened his defence by stating that the alleged libel was only a fair and *bonâ fide* report of what had taken place on the former trial: and the objection then taken by the plaintiff's counsel, was, not that the fact of the publication being a fair and impartial account of the proceedings, was not an answer to the action, but that the defendant's counsel was not entitled to read the whole of the letters which were in evidence on the former occasion, because the whole were not set out *verbatim* in the alleged libel. The objection was, in

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terms, limited to the admissibility of the letters. It is now said that the whole matter of defence was inadmissible, because not specially pleaded. The question is, whether the publication complained of was what the law calls a protected or privileged communication. The inference of malice arising from the publication of libellous matter, is rebutted by shewing that it was published upon a lawful occasion. Not guilty puts in issue the tendency of the alleged libel, and also the lawfulness of the occasion upon which it was published. It does not follow that a defence may not be given under not guilty, because it might also form the subject of a special plea. I think the evidence was admissible on the record as it stood; and, my learned brothers being of opinion that there was no misdirection, I see no ground for disturbing the verdict.

Rule refused.

BLACKETER and Others *v.* GILLETT.

Jan. 15.

In case for the disturbance of a ferry, a count alleging that the plaintiffs were entitled to a certain ferry across the *Thames*, that the defendant conveyed passengers and goods across the river *near* to the plaintiffs' ferry, and that, by reason thereof, the plaintiffs lost profits, and were prejudiced and disturbed in the possession and profit of their ferry, was held, after verdict for the plaintiffs, to disclose a sufficient cause of action.

Where, on a motion in arrest of judgment a clear objection is not shewn, the party will be left to his writ of error.

THIS was an action upon the case for the disturbance of a ferry.

The first count of the declaration stated that the plaintiffs, before and at the time of the committing of the grievances thereinafter mentioned, were, and from thence hitherto had been, and still continued, possessed, to wit, as trustees for the society of Free Watermen of the River *Thames*, residing at *Greenwich*, in the county of *Kent*, called "*The Isle of Dogs Ferry Society*," of an

antient ferry, called *Potter's Ferry*, for foot-passengers, and goods belonging to such foot-passengers, across the river *Thames*, from a certain place in the *Isle of Dogs*, in the parish of *Stepney*, in the county of *Middlesex*, to *Greenwich*, in the county of *Kent*; taking for the carriage and conveyance of such passengers, and their goods, as have occasion for the same, over and across such ferry, in any boat or boats kept by or by the authority of the plaintiffs for that purpose, certain reasonable freights or ferryages, to wit, one penny for every person on foot: nevertheless, that the defendant, not being one of the free watermen aforesaid, but well knowing the premises, and contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of the said ferry, theretofore, to wit, on &c., injuriously and unlawfully, and against the will of the plaintiffs, carried and conveyed, in a certain boat of him, the defendant, divers foot-passengers, for hire, over and across the said river *Thames*, and upon the said part of the same river where the plaintiffs had such ferry as aforesaid, and upon the said ferry of them the plaintiffs, to wit, from the *Isle of Dogs* aforesaid to *Greenwich* aforesaid; and that, by reason thereof, the plaintiffs had lost and been deprived of divers profits and emoluments which would otherwise have arisen and accrued to them from the enjoyment of their ferry, and had been and were greatly prejudiced and disturbed in the possession and profit thereof, and in their right and title thereto.

The second count stated that the plaintiffs, as trustees as aforesaid, were entitled to the fee-simple and inheritance of the said ferry, and that, whilst the plaintiffs were so entitled as trustees to the fee-simple and inheritance of the said ferry, the defendant conveyed divers passengers and goods over and across the river *Thames*, near to the said part of the said river where the plaintiffs had such ferry as aforesaid, and near to the said ferry,

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to wit, from the *Isle of Dogs* aforesaid to *Greenwich* aforesaid; and that, by reason thereof, the plaintiffs lost and were deprived of divers profits and emoluments which would otherwise have arisen and accrued to them from the enjoyment of their said ferry, and were greatly prejudiced and disturbed in the possession and profit thereof, and in their right and title thereto, &c.

At the trial, before *Wilde*, C. J., at the sittings in *Middlesex*, after last *Michaelmas* term, a verdict was found for the defendant on the first count, and for the plaintiffs on the second.

Peacock, on behalf of the defendant, now moved to arrest the judgment. The second count discloses no cause of action. It merely alleges that the plaintiffs were entitled to a certain ferry, and that the defendant conveyed passengers and goods across the river *near* to the plaintiffs' ferry, and that by reason thereof the plaintiffs lost profits and were prejudiced and disturbed in the possession of the ferry: whereas, to give a cause of action, it should have charged the defendant, either with setting up a new ferry, as in *Churchman* v. *Tunstal* (*a*), and 2 *Rolle's* Abridgment, 140. l. 20., (*b*) cited in *Com. Dig. Action upon the Case for a Nuisance* (A.), — or with having so carried the passengers and goods fraudulently and with intent to evade the plaintiffs' antient ferry, as in *Tripp* v. *Frank* (*c*), and *Huzzey* v. *Field*. (*d*) [*Williams*, J. Surely this is a very old form of declaring.] The old form was, charging the setting up

(*a*) *Hardres*, 162.

(*b*) Translated, 16 *Vin. Abr.* 26, pl. 4, and citing 22 *H.* 6. 14. b. (*M.* 22 *H.* 6. fo. 14. pl. 23., *Prior of St. Nede* v. *Weston*.) That was an action for erecting a horse mill, to the injury of three mills of the prior, in which the ferry question was discussed *obiter* between *Paston*, *J.*, and *Newton*, *C. J.*

(*c*) 4 *T. R.* 666.

(*d*) 2 *C. M. & R.* 432., 5 *Tyrwh.* 855. And see *Peter* v. *Kendal*, 6 *B. & C.* 703.

a new ferry, to the nuisance and disturbance of the antient ferry. [*Maule*, J. The second count is substantially the same as that in the case of *Tripp* v. *Frank*. Does not the concluding allegation, that the plaintiffs "were greatly prejudiced and disturbed in the possession and profit of their antient ferry, and in their right and title thereto," make the count good? The plaintiffs, to entitle them to a verdict on this count, must have proved, not merely that the defendant carried over some person near to their ferry, but that the act complained of was a disturbance of their right.] It is not enough to say that the defendant disturbed the plaintiffs' ferry, without saying how. [*Maule*, J. Probably not, on special demurrer: but the question is, whether it is not sufficient after verdict.] The thing relied on as a disturbance of the plaintiffs' right, must be something that is equivalent to a setting up a new ferry.

MAULE, J. Carrying passengers and goods across the river in the manner here alleged, may or may not be a disturbance of the plaintiffs' ferry. The count charges a disturbance; and the jury have found it.

It is only in a tolerably clear case that the court will grant a rule to arrest the judgment. We think this is a case in which the defendant ought to be left to his writ of error, if so advised.

Rule refused. (*a*)

(*a*) See *Blissett* v. *Hart*, *Willes*, 508., *Bull. N. P.* 76.

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NAVONE *v.* HADDON and Another.

Jan. 25.

Upon a policy on goods free from particular average, no damage short of the absolute destruction of the thing insured, will amount to a total loss.

The plaintiff insured certain bales of waste-silk, from *Leghorn* to *Liverpool*, with the usual memorandum declaring silk free from average, unless general, or the ship should be stranded. The vessel, being compelled by stress of weather to put into *Gibraltar*, was there repaired, her cargo being necessarily unloaded. Some of the bales of silk were found to be considerably damaged by sea-water, and were consequently sold at *Gibraltar*, by the master, in the exercise of what the jury found to be a reasonable discretion, and such as a prudent owner uninsured would have exercised. But the silk might at a reasonable or moderate expense have been put in a condition to be brought home by another vessel: and it *was* in fact brought to *England*, and sold as silk, though in a very deteriorated state:— Held, that this was not a total loss; and, consequently, that the assured was not entitled to recover.

COVENANT, against two of the directors of *The Neptune Marine Insurance Company.*

The plaintiff declared upon a policy of insurance effected by him with the company upon eighty-one bales of waste-silk, valued at 2245*l.*, warranted free of particular average, unless the ship should be stranded. The voyage was, in ship or ships at and from *Genoa* to *Leghorn*, and at and from thence *per* ship or ships to *Liverpool.* The declaration averred that forty-four out of the eighty-one bales of silk insured, were shipped at *Genoa*, and transhipped at *Leghorn* on board the *Wanderer*, on the voyage mentioned in the policy; that one *Pierre Borella* was interested in the silk; and that there was a total loss, by perils of the seas, of twenty-three of those bales, and a general average as to the remainder of the forty-four bales.

The defendants traversed the total loss averred, and paid into court a sum sufficient to cover the general average loss.

The cause was tried before *Williams*, J., at the sittings in *London* after *Trinity* term, 1848, when a verdict was found for the plaintiff, with 620*l.* damages,

subject to the opinion of the court upon the following case: —

The ship *Wanderer*, with forty-four of the eighty-one bales of silk mentioned in the policy, and a general cargo consisting of Indian corn, flour, and other articles, sailed from *Leghorn*, on the voyage insured against, on the 15th of *April*, 1846. From the 17th, she suffered bad weather, — the effect of which was detailed in the evidence: the water increased in the hold, and, notwithstanding incessant working at the pumps, she, on the 23rd, was making twelve inches of water *per* hour. After throwing overboard a part of the Indian corn, it became necessary, from the state of the ship, to put into *Gibraltar*, which was done on the 11th of *May* following. At *Gibraltar*, several surveys, by direction of the captain, were made of the ship; and it was found to be necessary to unload her cargo. This was done, and the forty-four bales of silk were taken out and examined. Some were found to have sustained no damage; others,— about eleven bales, — were damaged by the sea-water (by reason of the bad weather already mentioned), but were not considered by the surveyors to be incapable of being carried on. These undamaged and partially damaged bales were therefore re-shipped on board the *Wanderer* when she was repaired, and were conveyed to *Liverpool:* and, as to those, no question arises. As to the remaining (twenty-three) bales, both parties gave evidence of witnesses at *Gibraltar*, who had, by direction of the master, surveyed them, and of witnesses in *England* chiefly engaged in the silk-trade. It appeared, that, when examined, these twenty-three bales were found to be saturated with sea-water, greatly heated, partly in a state of putridity, and to emit an intolerable stench, which infected the atmosphere for some distance. As to the cause of this stench, the witnesses differed in opinion, — one ascribing it to the excrement of the

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silk-worm, which, in his judgment, remained in the article called waste-silk, and which, when wetted by the sea-water, would cause putrefaction in the silk; others, who were of opinion that the excrement of the worm did not necessarily remain in the waste-silk, thought the action of sea-water on waste-silk was alone sufficient to account for the stench.

The witnesses for the plaintiff who had examined the silk at *Gibraltar*, were of opinion, that, if it had been reshipped, it would have arrived in *England* spoiled and perished, and wholly valueless, and have destroyed some other perishable part of the cargo of the *Wanderer*; that there was no part of any one of those twenty-three bales which could have been properly re-shipped; and that no endeavour to prepare the silk for re-shipment would have been successful.

The witnesses for the defendants examined at *Gibraltar* were persons who had there bought six of the twenty-three bales, at the sale hereafter mentioned. The purchaser of two of them described them as wholly damaged and spoiled, except about sixty-eight or seventy pounds in the centre of one of them, which were very slightly damaged,—the whole weight of that bale being about seven hundred and forty pounds,—which sixty or seventy pounds he thought would have been serviceable for the purposes to which waste-silk is usually applied. The purchaser of two of the others had them shipped to *England*, and sold, he losing about forty dollars by the transaction. The purchaser of one of the others had not been able to re-sell it: it was damaged to the extent of one-third in bulk; the remainder was dry and sound. The purchaser of the rest had sent it to *England* at a fixed price; but it had not been sold. Of these witnesses, some described the other bales thus:—Some of the bales were completely and entirely damaged and spoiled; others had a portion dry and

sound, some to the extent of a third or fourth, others in a much less proportion.

The English witnesses for the defendants proved, that three of the above bales, and another bought by a purchaser who was not examined, were sold in *England* as silk; and that, in their opinion, silk in the state in which the above twenty-three bales were described to be, could have been sent to *England* by steamers, without being dried, and could there have been washed and so dealt with as to retain the character of silk.

The twenty-three bales were sold by the master, under the advice of the surveyors who had examined them, as before mentioned.

The examination of the ship was on the 16th of *May*, — the day after the ship's arrival. The surveyors recommended the Indian corn to be discharged.

The second examination was on the 19th, when they recommended that the whole of the perishable and light part of the cargo should be discharged, and the vessel further examined. The silk was accordingly conveyed on board a floating store in the bay, and examined on the 23rd of *May*, when the surveyors recommended an immediate sale of the twenty-three bales. Notice of sale by auction was given; and the sale took place, by direction of the master, on the 27th and 28th of *May*.

The *Wanderer* was under repair until the 30th of *June*. On the 2nd of *July* she sailed for *Gibraltar;* and she arrived at *Liverpool* on the 20th of *July*.

Mr. *Borella*, the person interested in the goods, resides at *Manchester*. He received no information as to the ship, until a few days before her arrival at *Liverpool*, when he received information that she had put into *Gibraltar*. On the 27th of *July*, he received information of the fact of the damage which had been sustained by the silk, and of the fact of the sale, and the account-sales, in the same letter.

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The plaintiff had no agent at *Gibraltar*.

The defendants' counsel contended at the trial, — first, that this was an insurance upon the whole eighty-one bales; and that, as all but the twenty-three in question had arrived at their place of destination, there could be no total loss within the meaning of the policy. The learned judge overruled this objection, and directed the jury that the insurance was to be taken as upon each bale.

Secondly, that, at all events, if the silk could have been put into a state in which it could have been conveyed to *England* in any other ship, it was the duty of the assured to incur the expense of putting it into such state, and of so conveying it.

The learned judge left to the jury the questions following, to which they returned the answers following: —

First — Was the damage to the goods such as to involve total destruction in specie, either actual or inevitable? Answer,—that some portion (but what portion they could not say) of each bale would have arrived home without losing its character of silk.

Secondly, — Would a prudent owner uninsured have adopted the course which, in fact, was adopted as to these bales? Answer, — Yes, he would.

Thirdly, — Did the damage to the goods render them such an intolerable nuisance to the rest of the cargo of the *Wanderer*, that it was reasonably justifiable in the master to refuse to carry them any further in that ship? Answer, — that the damage to the goods rendered them such a nuisance to the ship's crew (but not injurious to the cargo) that it was reasonably justifiable to decline to carry them any further in the *Wanderer*.

Fourthly, — Was it possible to examine the goods, and, by a reasonable expense, or moderate expense, at *Gibraltar*, to send them home, so that they would still

bear the character of silk, by some other vessel? Answer, — Yes, by some other vessel.

The question for the opinion of the court, is, whether the plaintiff was entitled to recover as for a total loss in respect of any, and if any, of how many, of the bales. If he was, the verdict is to stand for such sum as the court shall direct. If he was not, a verdict is to be entered for the defendants.

Barstow, for the plaintiff. (*a*) Upon the findings of the jury, as set out in the case, the plaintiff is clearly entitled to recover in respect of the whole twenty-three bales. It appears that these bales were in a state of putrefaction, and therefore the master was justified, by his duty in regard to the health of the crew, in declining to bring them home. It will probably be contended on the other side, that it was the duty of the assured to incur the expense of putting the silk in a state to be brought to *England*. But it is found as a fact, that he had no agent at *Gibraltar*, and that the master, in the course he adopted, acted *bonâ fide* for the benefit of all concerned. In *Cocking* v. *Fraser* (*b*), which was an action for a total loss of a cargo of fish, upon a voyage from *St. John's, Newfoundland*, to a port in *Portugal*, — the policy containing the usual memorandum declaring fish, &c., free from aver-

(*a*) The point marked for argument on the part of the plaintiff, was as follows :— "The plaintiff will contend, that, under the circumstances disclosed by the special case, he is entitled to recover as for a total loss of the twenty-three bales of silk in question."

For the defendants : —"The defendants will contend, that, as part of the subject-matter insured arrived at its place of destination uninjured, there was no total loss within the meaning of the policy ; and that, if the uninjured part could have been put into a state in which it could have been conveyed to *England*, it was the duty of the insured to incur the expense of putting it into such a state, and of so conveying it."

(*b*) *Park, Ins.* 8th edit. 247.

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age, unless general, or the ship were stranded, — the cargo remaining *in specie*, though by sea-damage rendered of *no value*, the underwriters were held not liable, there having been no stranding: and Lord *Mansfield* said: "This clause, relative to fruit and fish, is now a very old one in policies of insurance. The insurer undertakes for all losses except particular damage, unless the ship be stranded: he engages against a total loss. What is a total loss? The total loss of the thing insured, is, the *absolute destruction* of it, by the wreck of the ship. The fish may all come to port; though, from the nature of the commodity, it may be damaged, it may be stinking: still, as the commodity *specifically* remains, the underwriter is discharged." But Lord *Kenyon*, in *Burnett* v. *Kensington* (*a*), said "that he could not subscribe to the *dictum* of Lord *Mansfield*, in *Cocking* v. *Fraser*, that, if the commodity specifically remain, the underwriter is discharged." *Cocking* v. *Fraser* was also considered in *Dyson* v. *Rowcroft* (*b*), where the court adopted the doubt thrown upon the case of *Cocking* v. *Fraser*, in *Burnett* v. *Kensington*. *Dyson* v. *Rowcroft* was the case of a policy on fruit from *Cadiz* to *London*, with the usual memorandum. In the course of the voyage, the fruit was so much damaged by sea-water, that it became rotten, and stunk; and, on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also, being too much damaged to proceed on the voyage, was sold, and the cargo was necessarily thrown overboard. It was held that the assured were entitled to recover as for a total loss. *Cologan* v. *The London Assurance Company* (*c*) is also in point. There, a cargo

(*a*) 7 *T. R.* 210.
(*b*) 3 *Bos. & Pull.* 474.
(*c*) 5 *M. & Selw.* 447.

of wheat, fish, and staves, was insured at and from *Quebec* to *Teneriffe*, the policy containing the usual memorandum as to corn and fish being free from average, unless general. The ship was captured, and afterwards recaptured, and sent by the recaptors to *Bermuda*, where, a scarcity prevailing, an embargo was laid on the export of provisions; and, the cargo being landed, it was found that 585 bushels of wheat were so damaged by sea-water that they were, by order of the magistrates, for the sake of the public health, thrown overboard; and, other part of the wheat being damaged, the captain sold that part, and the fish (which sold at a profit), and put up the ship to sale, and purchased her for the benefit of the owners, at not more than one fourth of her value; and, having repaired her, and being refused permission to ship the remaining wheat to *Teneriffe*, he directed it to be sold, and purchased it for the benefit of those concerned; and, by leave of the governor, the embargo being then raised as to the *West India* islands, shipped the same for *Madeira*, where he arrived, and delivered it, taking in there a cargo of wine for *London*, with which he arrived: and it was held that the assured, who had abandoned, upon receiving intelligence of the circumstances which happened previously to the time of the ship's being permitted to proceed to *Madeira*, were entitled to recover as for a total loss of the whole of the goods insured. (*a*) [*Cresswell*, J. The form of the policy, excluding average loss, places you in this difficulty. Can it be said that this silk was totally lost when at *Gibraltar?* It is another thing to say it was not worth the expense of bringing home.] The case cer-

(*a*) Lord *Ellenborough* begins his judgment in that case thus, —"This seems to me to be a case of total loss, and on this ground, that, by the capture, a total loss occurred in the first instance, and, while the assured had no reason to believe that events had changed the nature of the loss, they abandoned."

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tainly states that it existed *in specie* as silk. [*Maule*, J. Not only did it exist *in specie*, but it was of some value, — it was sold as silk. Can it, then, be said to have been totally lost?] If its condition was such as to justify the master in selling it, it *was* totally lost to the owner. In *Gernon* v. *The Royal Exchange Assurance Company* (*a*), it was expressly held, that, if a cargo be so much damaged that it is not fit to be sent forward to a market, the assured may abandon, as a total loss. [*Maule*, J. That was not the case of an assurance free from average.] If the cargo is so damaged by a peril insured against, that no prudent master would bring it home, the loss is total. [*Wilde*, C. J. Is the cargo unfit to proceed, when a little expense may restore it? *Cresswell*, J. What amount of injury to the silk would have justified the *assured* in treating it as a total loss? Would 80 or 90 *per cent.*?] Probably not. [*Cresswell*, J. Neither would 99 *per cent.*: to charge the underwriters upon such a policy as this, there must be an actual total loss. *Davy* v. *Milford* (*b*) is very much like this case: there, the policy was effected on flax, valued at so much, and warranted free of particular average; and it was held, that, the vessel being wrecked, and the assured not having abandoned, but having laboured to save the cargo, and having in fact saved a part (one sixteenth), though much damaged, — they were entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest, which was saved to them *in specie*, though deteriorated.] *Parry* v. *Aberdein* (*c*) shews that that is not the true test. There, a vessel, having goods on board upon which an insurance was effected, but which were warranted free from average unless general, was placed in so much

(*a*) 6 *Taunt.* 383.
(*b*) 15 *East*, 559.
(*c*) 9 *B. & C.* 411., 4 *M. & R.* 343.

danger by perils of the sea, that the crew deserted her in order to save their lives; and the owners of the goods, upon receiving intelligence of this, gave notice of abandonment. A few days afterwards, the vessel was found by some fishermen, and towed into port, and repaired; but the goods (which were of a perishable nature) had been so much injured by the salt water, that they would not have been worth any thing if forwarded to the place of destination. It was held that the assured, under the circumstances, were entitled to recover for a total loss. All the authorities underwent discussion in *Roux* v. *Salvador* (*a*), where the judgment of this court (*b*) was affirmed on error. In that case, certain hides had been shipped on board a vessel at *Valparaiso*, for *Bordeaux*. The ship sailed from *Valparaiso* on the 13th of *May*, and on the 7th of *July* put into *Rio de Janeiro*, in consequence of damage by stress of weather. It being found that the hides were so much damaged that it would be impracticable to carry them *in specie* to the termination of the voyage, they being in such a state that they must either have been annihilated by putrefaction or thrown overboard, they were sold at *Rio* for one fourth of their sound value. On the 23rd of *July*, the ship set sail from *Rio*, on her voyage to *Bordeaux*, and was stranded, on the 29th of *September*, at the entrance of the *Garonne*. In an action on a policy containing a memorandum declaring *hides* free of particular average unless the ship was stranded, it appeared that the assured received the news of the damage, and of the sale of the hides, at the same time: and it was held that they were entitled to recover as for a total loss, without abandonment. Lord *Abinger*, in delivering the judgment of the court of error, says (*c*): "The

(*a*) 3 *N. C.* 266., 4 *Scott*, 1.
(*b*) See 1 *N.C.* 526., 1 *Scott*, 491.
(*c*) 3 *N. C.* 278., 4 *Scott*, 25.

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object of the policy is, to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel. Whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But *the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question.* If the goods are of an imperishable nature, if the assured become possessed of, or can have the control over, them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port, may be of no prejudice to them, beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But, if the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the *species* be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel, and if it be certain, that, before the termination of the original voyage, the *species* itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstance over which he has no control, they can never, or within no assignable period, be brought

to their original destination: in any of these cases, the circumstance of their existing *in specie* at *that forced determination of the risk*, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." In *Stevens* on Average (*a*), this very case is put:—"When a ship, on her voyage, puts into an intermediate port, in distress, to refit, &c., and, on unloading the cargo, it is discovered that some of the goods are damaged, which, *to prevent further deterioration*, are surveyed, and sold on the spot, in such a case, the claim must be adjusted as a salvage loss, and all the charge must be borne by the insurers; for, no particular average claim, according to the definition above stated, can be made up when the goods are sold at any other place than the port of destination. Here, the damaged goods are really (not as the term is often misapplied) sold on account of the underwriter, he paying all the charges, and even the freight, and the merchant is indemnified as for a total loss,—*ex. gr.* he receives the net proceeds from the person who effects the sales, and the balance from the underwriter." [*Cresswell*, J, The author is there merely giving the mode of stating an average loss.]

The other view of the case is this:—The assured, having no agent at *Gibraltar*, clearly was not bound to incur expense for the purpose of putting the silk in a condition to be re-shipped. The master, under the circumstances, was the agent of the underwriter. In Mr. Justice *Story*'s edition of *Abbott* on Shipping (*b*), it is said, that, if the cargo is of a perishable nature, "and there be no time or opportunity to consult the merchant, the master ought either to tranship or sell it,

(*a*) 5th edit. p. 80. (*b*) 5th *American* edit. p. 447.

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according as the one or the other will be most beneficial to the merchant." And, in a note thereto, reference is made to a case of *Jordan* v. *Warren Insurance Company* (*a*), where it was held, that, when a cargo is so much injured that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place where the necessity arises, even though it might have been carried to the port of destination, and there landed. That is exactly this case.

Martin (with whom was *Greenwood*), for the defendants, was not called upon.

WILDE, C. J. This is an action upon a policy of insurance on certain bales of waste-silk, valued at a certain sum, and warranted free of particular average, unless the ship should be stranded. The facts found are these:— That the vessel, with the silk on board, set sail on the voyage insured; that she encountered bad weather, and was compelled to put into *Gibraltar*; that, it being found necessary to unload the vessel, the silk was taken out; that, upon examination, certain of the bales were found to have sustained no damage, and others so little as not to render them incapable of being re-shipped and carried to their destination; and that certain other of the bales were found to be so much damaged by sea-water, that it was thought advisable to sell them at *Gibraltar;* but that no one of the bales was so damaged as to make the whole contents useless for any mercantile purpose. There was, therefore, no entire loss of any one bale; consequently, the facts stated, as it seems to me, decide the case. It is a case of average, and not of total, loss. It is found, that, by

(*a*) *Story, C. C.* 342.

incurring a reasonable expense, the silk might have been sent on by another vessel to its destination, though in a deteriorated state, still bearing the character of silk. What, then, is there to turn this into a total loss? From the nature of the article, and its being peculiarly susceptible of injury from various causes, the underwriter says he will not be liable to average loss on silk, except in a given event; and the premium is calculated with reference to his liability for a total loss only. Now, the facts found, are, that the silk in question was only partially damaged, that no one package was so injured as in the result to lead to its entire destruction, but that the whole might have been sent forward, as silk, in a reasonable time, and at a reasonable expense. There is, therefore, no pretence whatever for converting this into a case of total loss. The cases of *Anderson* v. *Wallis* (*a*) and *Hunt* v. *The Royal Exchange Assurance Company* (*b*) have settled that any delay within reasonable limits, would not suffice to make that a total loss which was not in its nature an entire destruction of the subject-matter of insurance. There was no unreasonable delay here; for, it appears that the *Wanderer* put into *Gibraltar* on the 11th of *May*, and was repaired and ready for sea on the 30th of *June*. To sustain the claim for a total loss, the case should have found circumstances which would have prevented the assured from having the benefit of the voyage. None such are found here: on the contrary, it is found, as before observed, that a reasonable expense would have enabled the master, within a reasonable time, to forward the silk to its destination. The facts bring the case within the authorities, which cannot be disputed, and which clearly entitle the defendants to our judgment. The only ground upon which

(*a*) 3 *Campb.* 440., 2 *M. & S.* 240. (*b*) 5 *M. & Selw.* 47.

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it was sought to distinguish the case from those which are adverse to the plaintiff's view, was, that it is found here that the assured had no agent at *Gibraltar*. But, when it is found that the goods might have been forwarded at a reasonable cost, and within a reasonable time, to their destination, I think that argument fails.

MAULE, J. I also am of opinion that our judgment must be for the defendants. *Roux* v. *Salvador* was relied on for the plaintiff: but the decision there, proceeded upon the fact that the hides were damaged to such an extent that they could not have been forwarded to their destination in such a state as to retain the character of hides. The loss, therefore, clearly was total. Here, the silk was very much damaged, but not to such an extent as to prevent its being carried, as silk, to its destination. A partial loss cannot be turned into a total loss, because those who have the control over the goods, may act prudently in selling them at an intermediate port, rather than incur the expense of cleansing and re-shipping them. It may be that a prudent owner uninsured would not have thought it worth his while to carry these goods further, but would have left them behind: still, that alone would not make the loss total.

CRESSWELL, J. I am entirely of the same opinion. Lord *Mansfield*, in the first case which I believe is to be found in the books upon this subject, expressed an opinion, that, upon a policy in this form, there could be no total loss, where the goods still physically existed. Some exceptions have, undoubtedly, been engrafted upon the rule so unequivocally laid down. Still, if the goods are in such a state that they are capable of being forwarded, however they may be deteriorated, the loss is not a total loss. The American courts seem to adhere

to the rule laid down in *Cocking* v. *Fraser*. Whether that is the better rule or not, it is not worth while now to consider; for, there clearly has been no total loss here, even according to the more liberal principle adopted by the recent English decisions.

WILDE, C. J. My brother *Williams*, who was present when the argument took place, concurs in the decision we have pronounced.

Judgment for the defendants.(*a*)

(*a*) In *Arnould* on Insurance, Vol. II. p. 855., it is said that "It is quite certain that no amount of mere *deterioration* by sea-damage, however great, which does not annihilate the physical and distinctive character of the goods, will render the underwriter liable, especially where they arrive in bulk at their port of destination. (Citing *M'Andrews* v. *Vaughan*, *Marshall* on Ins. 219., *Park*, Ins. 252., 8th edit.; *Mason* v. *Skurray*, *Marshall* on Ins. 218., *Park*, 8th edit. 253.; *Glennie* v. *The London Assurance Company*, 2 *M. & Selw.* 371.; *Anderson* v. *The Royal Exchange Assurance Company*, 7 *East*, 38.; *Thompson* v. *The Royal Exchange Assurance Company*, 16 *East*, 214.; *Hedburg* v. *Pearson*, 7 *Taunt.* 154.). In this country, where a cargo, or part of a cargo, of memorandum articles is made up of *several distinct packages, each capable of a distinct valuation*, and any one of these be entirely lost, the underwriters are liable to the full value of the package so lost, this being considered a *total loss* of such *part*. (Citing *Davy* v. *Milford*, 15 *East*, 559.) But, in order to this, each package must be literally and entirely lost or destroyed in bulk: if its contents be only deteriorated, or in great part washed out by sea-water, whatever the extent of the depreciation may be, the rule does not apply, and the underwriter is not liable. (Citing *Thompson* v. *The Royal Exchange Assurance Company*, and *Hedburg* v. *Pearson*.) In the *United States*, this whole doctrine of the total loss of part is exploded, and the construction of the memorandum settled to be, that, unless there be a total loss of the whole *species* (as, of all the *corn*, or all the *sugars* on board) the underwriter is not liable, whether the article be shipped in bulk or in several distinct packages:" *Wardsworth* v. *The Pacific Insurance Company*, 4 *Wendell's Rep.* 33.

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LYSAGHT *v.* BRYANT.

Jan. 14.

A. and *B.* carried on business in partnership. The firm being indebted to *C.*, *A.* (who acted as *C.*'s agent), with the concurrence of *B.*, indorsed a bill of exchange in the name of the firm, and placed it amongst the securities which he held for *C.*, but no communication of the fact was made to *C.*: — Held, a good indorsement by *A.* & *B.*, to *C.*

The holder of a bill of exchange may, in an action against the drawer, avail himself of a notice of dishonour given in due time by any party to the bill, who, at the time of giving such notice, was under liability to him.

ASSUMPSIT. The first count of the declaration stated that the defendant, on the 7th of *May*, 1847, made his bill of exchange in writing, and directed the same to one *Matthews*, and thereby required the said *Matthews* to pay to his, the defendant's, order, the sum of 800*l.*, six months after the date thereof; that the defendant then indorsed the said bill to one *James Lysaght* and one *William Smithett*, who then indorsed the same to the plaintiff; and that *Matthews* did not pay the same, although duly presented, — of which the defendant had notice, &c.

Pleas, amongst others, — first, that the defendant had no notice of the dishonour of the bill by the drawee; secondly, that *Lysaght* & *Smithett* did not indorse the bill, in manner and form as in the first count alleged.

The cause was tried before *Wilde*, C. J., at the sittings in *London* after the last term. It appeared that *James Lysaght* and *William Smithett* had carried on business in partnership together, as *East India* merchants; and that the firm being indebted to the plaintiff, *Admiral Lysaght*, the father of *James Lysaght*, in the sum of 6000*l.*, *James Lysaght*, in *July* or *August*, 1847, with *Smithett*'s concurrence, and in his presence, indorsed the bill in question to the plaintiff. To prove this, *James Lysaght* was called. He stated, that, after he had so indorsed the bill, he held it as his father's agent, keeping it either in a separate part of the cash-box, or at his chambers in *Regent Street*. It did not appear

that the fact of the indorsement had been communicated by the son to the father.

The bill was duly presented on the 10th of *November*, when it became due, but was not paid; whereupon *Lysaght & Smithett*, on the 11th of *November*, gave the defendant the following notice of dishonour: —

"Sir, — We beg to inform you that your draft on Mr. *Matthews*, dated the 7th of *May* last, at six months' date, for 800*l.*, was duly presented, at &c., for payment, when the answer given to the notary was, 'no effects.' The bill is now in our possession, and we require you to take it up immediately. Meanwhile, we request you to take notice we do not release you from responsibility by holding it over. "Yours, &c.

"*Lysaght, Smithett*, & Co."

On the part of the defendant, it was proved that it was the custom of notaries in *London* to keep copies of all bills that pass through their hands, with all indorsements thereon, and that this practice was observed at the office of *Duff*, the notary by whom the bill was presented. And the notary's book was produced, and the clerk who entered the bill therein, called: and from these it appeared, assuming the entry to have been correctly made, that there was no indorsement by *Lysaght & Smithett* upon the bill at the time of its presentment.

It was then submitted that the notice of dishonour was insufficient.

The lord chief justice reserving that point, left it to the jury to say whether the indorsement by *Lysaght & Smithett* was made before or after the bill arrived at maturity.

A verdict having been found for the plaintiff,

Byles, Serjeant, pursuant to the leave reserved to him at the trial, moved for a rule *nisi* to enter the

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verdict for the defendant, or for a new trial on the ground that the verdict was against evidence. Assuming that the jury were justified in giving credit to the witness *James Lysaght*, rather than to the entry in the notary's book, there was no proof of the indorsement, to constitute which there must be something more than mere writing on the back of the instrument: there must be a delivery, actual or constructive, to the indorsee. [*Wilde*, C. J., there was evidence that *James Lysaght* acted as his father's agent; and he swore that he had appropriated and set apart this bill, after it had been indorsed, for his father.]

Assuming, then, that Admiral *Lysaght*, was the holder of the bill at the time it became due, the notice of dishonour given by *Lysaght & Smithett*, did not enure as a notice from him. The object of the notice of dishonour is twofold: not only must it shew that the bill has been presented and refused payment, but it must also contain a notification of the fact that the party who gives the notice, looks to the party who receives it, for payment of the amount. Three cases have occurred that are somewhat like the present. In *Woodthorpe* v. *Lawes* (*a*), a bill of exchange indorsed in blank was left by the indorsee at the office of *R.*, an attorney, to be presented by him. The bill being dishonoured, *R.* sent the following notice to the drawer: — "A bill drawn by you upon, and accepted by, Mr. *J. W.*, for 31*l.* 3*s.*, due yesterday, is dishonoured and unpaid; and *I am desired* to give you notice thereof, and to request that the same may be immediately taken up:" and this was held to be a sufficient notice, although the attorney did not state on whose behalf he applied, or where the bill was lying. The expression, however, "*I am desired* to give you

(*a*) 2 *M. & W.* 109.

notice," was equivalent to saying that the person giving the notice did so as agent for the holder. In *Chapman* v. *Keane* (*a*), it was held that the holder of a bill is entitled to avail himself of notice of dishonour given by any party to the bill; and, therefore, that an indorsee, who has indorsed over, and is not the holder at the time of the maturity and dishonour, may give notice at such time to an earlier party, and, upon afterwards taking up the bill, and suing such party, may avail himself of such notice. In *Harrison* v. *Ruscoe* (*b*), a bill of exchange was drawn by *A.*, indorsed by him to *B.*, and by *B.* to *C.*, in whose hands it was dishonoured. C.'s attorney gave notice of dishonour in due time to *A.*, but stated therein, by mistake, that he was directed by *B.* (from whom he had no authority,) to apply for payment of the bill: and it was held that the notice of dishonour was sufficient, notwithstanding the misrepresentation, the only effect of which was, to give *A.* every defence against *C.* that he could have had if the notice had really been given by *B.* That case is the converse of this,—the notice being given by the party coming *after* the plaintiff on the bill. [*Williams*, J. *Parke*, B., in that case says: "Since the case of *Chapman* v. *Keane*, it must be considered as perfectly settled, that a notice of dishonour need not be given by the holder, but that he may avail himself of notice given, *in due time*, by any party to the bill. The decision in that case is referred to and adopted by Chancellor *Kent* (*c*), and Mr. Justice *Story* on Bills of Exchange. (*d*) The former states the rule to be, that the notice may be given by any one who is a party to the bill: the latter states it more fully, and says that the notice will be sufficient, although not given by the holder or his

(*a*) 2 *Ad. & E.* 193., 4 *N. & M.* 607.

(*b*) 15 *M. & W.* 231.

(*c*) 3 *Kent's Comm.* p. 100.

(*d*) Sect. 304.

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agent, if it comes from some person who holds the bill when it is dishonoured, or is a party to the bill, or who would, on the same being returned to him, and after payment, be entitled to require reimbursement thereof." The party who avails himself of a notice so given, must stand in the same position as the person whose notice he avails himself of. *Maule*, J. Has this defendant any defence against *Lynaght & Smithett*? A notice by an intermediate party, is a good notice by the plaintiff, but it lets in a set-off or other defence which the defendant would have had against the person who actually gives the notice. The defendant has not had such a notice as to entitle the present plaintiff to sue him upon the bill. *Cresswell*, J. I find the rule thus laid down in *Byles* on Bills (*a*): "The object of notice is two-fold; first, to apprise the party to whom it is addressed, of the dishonour; and, secondly, to inform him that the holder, or party giving the notice, looks to him for payment. (*b*) Hence, it follows that notice can only be given by some party to the instrument, though he need not be the *actual holder* of the bill at the time (*c*), but that a stranger is incompetent to give it. (*d*) And it has been held by Lord *Eldon*, that notice by the first indorsee, who had not himself received notice from the second indorsee, and who was not, therefore, obliged to take back the bill, was insufficient as between the second indorsee and the drawer. (*e*) And it seems clear, that even a party to the bill, who has been already discharged by *laches*, or who could

(*a*) 5th edit. p. 214.

(*b*) Citing *Tindal* v. *Brown*, 1 *T. R.* 167.

(*c*) Citing *Chapman* v. *Keane*, 3 *Ad. & E.* 193., 4 *N. & M.* 607., and *Harrison* v. *Ruscoe*, 15 *M. & W.* 231.

(*d*) Citing *Stewart* v. *Kennett*, 2 *Campb.* 177. *Vide tamen Abel* v. *Potts*, 3 *Esp. N. P. C.* 242.

(*e*) Citing *Ex parte Barclay*, 7 *Ves.* 597.; but *quære*, since the case of *Chapman* v. *Keane*.

not in any event sue, is incompetent to give notice. (*a*) But a prior indorsee, who has himself received due notice, may transmit it. (*b*) And notice by the holder, or by a party who is liable to be sued, and may be entitled to sue, will enure to the benefit of all antecedent or subsequent parties. So that a notice by the last indorsee to the drawer, will operate as a notice from each indorsee to the drawer; and, if the payee, or first indorsee, has duly received notice, a notice by him to the drawer will be equivalent to a notice from each indorsee, and from the holder, to the drawer. (*c*) And a notice from an intermediate party may, in pleading, be described as a notice from the plaintiff." (*d*)] That is not quite accurate.

MAULE, J. I am of opinion that the notice of dishonour that was given in this case, was sufficient. *Lysaght* the younger appears to have acted as the agent of his father, the plaintiff. In that character, he received the bill from *Lysaght & Smithett*, by whom it was sworn to have been indorsed before it became due; and *Lysaght* the younger proved that it had ever since been kept by him amongst the documents which were held by him for his father. It was undoubtedly his duty to see that his father should have all proper remedies upon the bill. The bill, it seems, was presented on the day it became due, and was dishonoured; and due notice of dishonour was given by *Lysaght & Smithett* to the defendant, as drawer. *Ly-*

(*a*) Citing *Harrison* v. *Ruscoe*, 15 *M. & W.* 231, and *Miers* v. *Brown*, 11 *M. & W.* 372.

(*b*) Citing *Jameson* v. *Swinton*, 2 *Camph.* 373., 2 *Taunt.* 224., and *Wilson* v. *Swabey*, 1 *Stark. N. P. C.* 34.

(*c*) Citing *Bayley on Bills*, 209.

(*d*) Citing *Newen* v. *Gill*, 8 *C. & P.* 367.

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saght the younger having due notice of the dishonour, which operated as a notice to *Lysaght & Smithett*, it was clearly competent to the latter, according to the decided cases, to give notice to all prior parties to the bill; and a notice so given would enure as a notice by the party who had given notice to them. I therefore think the defendant has had a sufficient notice of dishonour. Then, as to the other point, — there was evidence on both sides. It was for the jury to say whether the plaintiff's witness was perjured or the defendant's mistaken. The former stated positively that the indorsement was made before the bill became due; the latter, not professing to have any special recollection on the subject, merely stated that it was the usual course of his office to copy all indorsements into the book which he produced, and that no such indorsement was entered therein. I think it is impossible for us to say that the jury, in giving credit to the positive statement, rather than to the inference arising from the statement on the other side, came to a wrong conclusion.

CRESSWELL, J. I am of the same opinion. Two questions arose in this case — first, whether the defendant had received a sufficient notice of dishonour, — secondly, whether *Lysaght & Smithett* indorsed the bill before it became due. The decision of the first question depends in some degree upon the second; because, whether the notice was sufficient or not, may depend upon whether there was a proper indorsement. Mere writing on the back of the bill is not enough to constitute an indorsement; there must be a delivery, or something equivalent to a delivery, of the bill to the indorsee. Here, the fact has been disposed of by the jury; and I think there was evidence enough to justify the conclusion they came to. *James Lysaght* swore positively that the bill was indorsed in the name, and with the concur-

rence, of the firm, in *July* or *August:* and he further stated, that, ever since the indorsement, it had been kept by him, as his father's agent, apart from the securities of the firm. That being so, it seems, from the cases, that the holder of a bill may avail himself of a notice of dishonour given in due time by a prior indorsee, provided he himself is in a condition to sue the party by whom the notice was given. Here, *Lysaght* the younger, holding the bill as his father's agent, duly presented it, and had it returned to him dishonoured. Notice of that fact to him, therefore, operating as notice to the firm, the present plaintiff was entitled to sue them, and consequently is in a condition to avail himself of the notice of dishonour given by them to the defendant.

WILLIAMS, J. I am of the same opinion. The evidence established the whole case, if the jury were right in the conclusion to which they came: and I am not prepared to say that they were wrong.

WILDE, C. J. I certainly was not dissatisfied with the verdict. *Lysaght* the younger swore positively that the security in question was appropriated by him, with *Smithett*'s assent, in part discharge of the debt due to the plaintiff. He was very strictly cross-examined as to the period at which the indorsement took place: he distinctly swore that it was before the bill became due: he *believed* it was in *July* or *August*. If *Lysaght & Smithett* intended to act honestly, they were bound to make the indorsement; and there is no reason for supposing that they did not, or that *James Lysaght* stated that which was untrue. On the other hand, there can be as little doubt that the notary's clerk meant correctly to copy the indorsements into the book. It was for the jury to decide between the conflicting statements. As

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to the notice of dishonour, the case seems to fall within the authorities. The facts shew that *Lysaght & Smithett* had due notice of the dishonour of the bill, — one of them having caused it to be presented, and having had it returned to him. A notice, therefore, by *Lysaght & Smithett,* then being under a liability to the present plaintiff, according to the authorities, enures as a notice to the defendant.

Rule refused.

LAWSON and Another *v.* DUMLIN.

Jan. 15.

A Trinity-House pilot, who, in navigating a vessel, negligently runs against and damages another vessel, is not within the protection of the 84th section of the pilot act, 6 *G.* 4. *c.* 125., which enacts, amongst other things, that all actions brought *for anything done in pursuance of the act,* shall be brought in the county where the cause of action arises, and not elsewhere.

THIS was an action upon the case brought by the plaintiffs, the owners of a collier, against the defendant, a Trinity-House pilot, for running foul of and injuring their vessel.

The declaration stated that the plaintiffs, before and at the time of the committing of the grievances thereinafter mentioned, were lawfully possessed of a certain ship or vessel called the *Sarah,* of great value, to wit, 5000*l.*, then lawfully being off the coast of *Essex;* that the defendant then had the care, control, &c., of a certain other ship or vessel; yet that the defendant, not regarding his duty in that behalf, to wit, on &c., took so little and such bad care of the said ship or vessel of which he had the care, control, &c., as aforesaid, and governed and navigated the same in so unskilful and improper a manner, that the same, by and through the carelessness, mismanagement, and improper conduct of the defendant, then, with great force and violence, ran foul of, and struck against, the said

ship or vessel of the plaintiffs, and thereby then greatly broke, injured, and damaged the same; and also, that, by reason of the premises, the plaintiffs then necessarily incurred divers expenses, to wit, 50*l.*, in and about the surveying and repairing the said damage so done to their said ship or vessel as aforesaid; and also, by means of the premises, the plaintiffs lost and were deprived of the use of their said ship or vessel, for a long space of time, &c.; to the plaintiffs' damage, &c.

The defendant pleaded not guilty "by statute," upon which issue was joined.

The cause was tried before *Wilde*, C. J., at the sittings in *London* after the last term. It appeared, that, on the 11th of *July*, 1848, the plaintiffs' vessel, the *Sarah*, was weighing anchor on the *Essex* side of the river, about five miles below the *Nore*, when the defendant, who had charge of a barque called the *Poictiers*, negligently ran foul of, and injured, the plaintiffs' vessel.

On the part of the defendant, it was objected that the venue was improperly laid in *London*, the 84th section of the pilot act, 6 *G.* 4. *c.* 125., requiring that all actions brought for anything done in pursuance of that act shall be brought in the county where the cause of action arises, and not elsewhere.

The lord chief justice directed the jury to find for the plaintiffs, reserving leave to the defendant to move to enter a nonsuit, or a verdict for him, if the court should be of opinion that the objection was well founded.

A verdict having been accordingly found for the plaintiffs, damages 35*l.*,

Byles, Serjeant, now moved, on the part of the defendant, to enter a nonsuit, or a verdict, pursuant to the leave reserved. The pilot act, 6 *G.* 4. *c.* 125. *s.* 84., enacts, "that, if any suit or action shall be brought or

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prosecuted against any person or persons for any thing done or to be done in pursuance of this act, in every such case the action or suit shall be commenced within six calendar months next after the fact committed, and not otherwise, *and shall be laid or brought in the county, city, or place where the cause of action arises,* and not elsewhere; and the defendant or defendants in such action or suit may plead the general issue, not guilty, and give this act and the special matter in evidence at the trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and, if it shall appear so to be done, or if any such action or suit shall be brought after the time limited for bringing the same, then the jury shall find for the defendant or defendants," &c. [*Cresswell*, J. Was the thing here complained of an act done "in pursuance of the act?"] The defendant, in the exercise of his duty as a Trinity-House pilot, was navigating the vessel in pursuance of the act. If he was strictly pursuing the act, he would not need the protection of this clause. The main difficulty that was presented to the defendant at the trial, was, that the place where the collision occurred, was not within the body of the county of *Essex*, but upon the high seas. But it is submitted that the river *Thames*, in law, commences at *Orfordness*, on the one side, and the *North Foreland* on the other; and that the jurisdiction of the Admiralty does not extend within those limits: *Leigh* v. *Burley*. (*a*) There, "*Burley*, master of a ship, gave money to *Cradock*, to buy sailors' clothes for him: *Cradock* bought such clothes for him of *Leigh*, in the parish of *St. Katherine's*, near the tower of *London*, whereby *Leigh* delivered the clothes to *Burley* in his ship that was in the *Thames* adjoining to *St. Katherine's*; and, because the money was not paid, he

(*a*) *Owen*, 122.

sued *Burley* in the Admiralty court: and a prohibition was awarded, for two causes,—first, because the contract was made on land, and *infra corpus comitatus*, and therefore the Admiral can have no jurisdiction; for, the statutes of the 13 and 15 of *Ric.* 2. (*a*) and 2 *H.* 4. *c.* 11. are, that the Admiral shall not have conusance but of things done *super altum mare:* vide 5 *Co. Rep.* 107. And so it was resolved by the justices: and they said that the 15 of *Ric.* 2. is misprinted, *viz.* that the Admiral shall have jurisdiction to the *bridges;* for, the translator mistook *bridges* for *points*, that is to say, the land's end. (*b*) And *Coke* said that the Admiral should have no jurisdiction where a man may see from one side to the other; but the coroner of the county shall inquire of felonies committed there; which was held to be good, by all the other justices: and he gave this difference, that, where the place was covered over with salt water, and out of any county or town, there *est altum mare*, but the trial shall be *per vicinetum* of the town." The like law is laid down in the Fourth Institute. (*c*) Lord *Coke* there says (*d*): "By the statute of 15 *Ric.* 2. *c.* 3. it is enacted and declared that the court of the Admiral hath no manner of conusance, power, nor jurisdiction of any manner of con-

(*a*) 13 *Ric.* 2. *c.* 5.; 15 *Ric.* 2. *c.* 3.

(*b*) The 15 *Ric.* 2. *c.* 3., as it now appears in the English translation, does not say affirmatively, that the Admiral *shall have* jurisdiction *to* the bridges, but, restricts it to, "only beneath the bridges of the same rivers nigh to the sea." The word "bridges" in this translation is warranted by the French original, not only as printed by *Runnington*, — "tantsoulment paraval les *pountz* de mesmes les rivres pluis proscheins al meer," — but also as it appears on the parliament-roll, where, in the Royal answer to the petition of the Commons against the encroachments of the Admiralty, the words are, — "tant-soulement par avale les *Pontz* de mesme le Rivers pluis proscheins al meer: 3 Rot. Parl. 291. a.

(*c*) Pages 135. 137. 140, 141.

(*d*) Page 137.

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tract, plea, or querell, or of any other thing done or rising within the bodies of the counties, either by land or by water, and also of wreck of the sea; but all such manner of contracts, pleas, and querels, and all other things rising within the bodies of the counties, as well by land as by water, as is aforesaid, and also wreck of the sea, shall be tried, termined, discussed, and remedied by the laws of the land, and not before nor by the Admiral nor his lieutenant, in no manner. Nevertheless, of the death of a man, and of a mayhem, done in great ships being and hovering in the main stream of the great rivers only beneath the points (*a*) of the same rivers, and in no other place of the same rivers, the Admiral shall have conusance. This latter clause giveth the Admiral further jurisdiction in case of death and mayhem (with neither of which we ever meddle); but, in all other happening within the *Thames*, or in any other river, port, or water, which are within any county of the realm (as all rivers and havens be, as hereafter shall manifestly appear), by express words of this act of parliament, the Admiral, or his deputy, hath no jurisdiction at all. Wherein it is to be observed how curious the makers of this statute were, to exclude the Admiral of all manner of jurisdiction within any water which lieth within any county of the realm." Before the statute 3 & 4 *Vict. c.* 65. *s.* 4. (*b*), the court of Admiralty had no jurisdiction in cases of salvage or collision in places within the jurisdiction of the common law courts: Case of *The*

(*a*) *Sic: sed vide suprà*, 57 (*b*).

(*b*) Which gives the court of Admiralty jurisdiction "to decide all questions as to the title to, or ownership of, any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said court after the passing of this act."

Eleanor (*a*); Case of *The Eliza Jane* (*b*). In *Davis* v. *Curling* (*c*), the declaration (in case) charged that the defendant was, under the highway-act, 5 & 6 *W.* 4. *c.* 50., surveyor of the parish of *T.;* that gravel had been placed on a highway in *T.*, by means of which gravel the highway was obstructed, and the gravel was a nuisance to the public; that the defendant had notice, and was requested to remove the same; but that he, well knowing, &c., did not nor would, in a reasonable time, remove it, or cause it to be removed, but, on the contrary, conducted himself with gross negligence, and knowingly, wilfully, and wrongfully, and in violation of his duty as such surveyor, permitted, suffered, and caused the gravel to continue and be upon the highway, obstructing the same, remaining and being a nuisance to the public, for a long and unreasonable time, without taking any care or precaution to guard against danger or damage to persons passing, contrary to his duty in that behalf as such surveyor; and that, by means thereof, the plaintiff's carriage was overturned. It was proved that the defendant had notice of the gravel being laid, and had been guilty of want of care in leaving it there, and that this had caused the accident. It was held that the defendant was charged with a thing done in pursuance of the act, and was therefore entitled to notice under s. 109. (*d*) *Maule* J. My brother *Patteson* explains the ground of that decision. He

(*a*) 6 *Rob. Adm. Rep.* 39.
(*b*) 3 *Hagg. Adm. Rep.* 335.
(*c*) 8 *Q. B.* 286.
(*d*) Which enacts "that no action or suit shall be commenced against any person for any thing done in pursuance of, or under the authority of, this act, until twenty-one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought, nor after sufficient satisfaction, or tender of satisfaction, has been made to the party aggrieved, nor after three calendar months next after the

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says: "The charge is not one of mere omission, but of actually continuing the nuisance. That is a charge of doing something wrong, of keeping the gravel in an improper place, an act continued until the occurrence of the mischief. Is it, then, an act done in pursuance of the statute? It is not denied that the heap of gravel was put there in pursuance of the statute: it could not be spread at the same moment: the question then would arise, whether the length of time during which it was kept in a heap, was reasonable or not. The continuing, therefore, was a thing done in pursuance of the statute."] The defendant here was piloting the *Poictiers* in pursuance of a duty cast upon him by the statute. [*Maule*, J. Suppose a policeman, in conveying a cart to the greenyard, negligently comes in contact with and damages a carriage,—would he be entitled to notice?] It is submitted that he would. It is of great importance to these pilots that questions of this sort should be tried in the county adjoining to which the accident happens, and where the state of the river is well known. [*Maule*, J. I do not think the statute could have intended to take away the right of action for a collision

fact committed for which such action or suit shall be so brought; and every such action shall be brought, laid, and tried where the cause of action shall have arisen, and not in any other county or place; and the defendant in such action or suit may plead the general issue, and give this act and every special matter in evidence at any trial which shall be had thereupon; and, if the matter or thing shall appear to have been done under or by virtue of this act, or if it shall appear that such action or suit was brought before twenty-one days' notice thereof given, as aforesaid, or that sufficient satisfaction was made or tendered as aforesaid, or if any action or suit shall not be commenced within the time before limited, or shall be laid in any other county than as aforesaid, then the jury shall find a verdict for the defendant therein," &c.

upon the high seas, and, by an oblique inference, to confer an exclusive jurisdiction, in such cases, upon the court of Admiralty. How is a man who is run down to know that the offender is a Trinity-House pilot?] They are public officers, who are compelled to perform a responsible duty. [*Wilde*, C. J. Suppose, in going out to a ship, the pilot negligently runs down a boat,—would he be within the protection of the act?] It is submitted that he would.

MAULE, J. I do not think that this case falls within the 84th section of the 6 *G.* 4. *c.* 125. Where a man mistakes his course, in doing something under the authority of an act of parliament, he is within the protection of a clause of this sort. But, here, the action is not brought for a thing done by the defendant in his character of pilot: it is not like the case of justices of the peace, who are compelled to hear and determine matters that are brought before them, and who sometimes, intending to act *bonâ fide* in discharge of their duty, mistake the proper course, and so subject themselves to actions. The scope of this act, is, to confer a monopoly in the navigation of vessels entering and leaving the *Thames*, upon a certain number of skilful persons. In consideration of that monopoly, those persons are bound to perform certain duties when properly called upon: but it is no *authority* conferred by the act upon the pilot. The business of a pilot clearly is one in the exercise of which a man *may be* guilty of negligence: and, if he *is* guilty of negligence, there can be no reason why he should not be liable for it, like any other individual. This clearly is not within the scope of the cases relied on. If the statute had meant to restrict actions against pilots to six months, or altogether to prohibit the bringing of actions against pilots, it would, no doubt, have said so

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in express terms. I think there is no ground for this motion.

CRESSWELL, J. I am of the same opinion. The defendant could not for a moment suppose, that, in running down the vessel in question, he was acting in pursuance of the act.

The rest of the court concurring,

Rule refused.

STORIE, Clerk, *v.* CHARLES RICHARD, Bishop of WINCHESTER.

Jan. 25.

In *quare impedit*, the ordinary cannot counterplead the patron's title, by setting up title in the Queen, by lapse.

Where the incumbent of a parish church presents himself to a district church within the parish, created under the statutes 58 *G.* 3. *c.* 45. and 59 *G.* 3. *c.* 134., — the annual value of the two livings exceeding 1000*l.*, — the parish church becomes, under the provisions of the 1 & 2 *Vict. c.* 106. *ss.* 4. 11., *ipso facto* void.

QUARE IMPEDIT. The declaration stated, that whereas *John George Storie*, the plaintiff, theretofore, and before and until and after the making of the representation and order in council, and the effecting of the division and assignment of the district parish of *St. Mary Magdalen, Peckham*, as thereinafter respectively mentioned, to wit, on the 16th of *April*, 1842, and from thence continually until and upon and after the 28th of *October*, 1843, was seised of the advowson of the vicarage of the church of *St. Giles*, in the parish of *Camberwell*, in gross, as of fee and right: And also, before the making of the said representation, and the order in council, and the effecting of the division and assignment thereinafter respectively mentioned, to wit, on the 1st of *May*, 1842, Her Majesty's commissioners for building new churches, duly caused the said church of

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St. Mary Magdalen to be built, to wit, under and in pursuance of the provisions of the act of parliament made and passed in the fifty-eighth year of the reign of His late Majesty King *George* the Third for building and promoting the building of additional churches in populous parishes, and of the act of parliament made and passed in the fifty-ninth year of the reign of His said late Majesty, to amend and render more effectual the said first-mentioned act: And the said last-mentioned church was then, to wit, on the day and year last aforesaid, duly consecrated, to wit, by the said *Charles Richard*, as, and being, such bishop as aforesaid: And thereupon, and whilst the said *John George Storie* was so seised as aforesaid, to wit, on the 1st of *June*, 1842, aforesaid, the said commissioners, having taken into consideration all the circumstances attending the said parish of *St. Giles, Camberwell*, were of opinion that it was expedient (amongst other things) that an ecclesiastical district should, to wit, under the provisions of the said first-mentioned act, be divided from the parish of *St. Giles, Camberwell*, aforesaid, and assigned to the said church of *St. Mary Magdalen*, for the purposes in the said first-mentioned act in that behalf mentioned; and did then, to wit, on the day and year last aforesaid, according to the statute in such case made and provided, represent such opinion to Her Majesty, the Queen, in council; and did state, in such representation, the bounds by which such district was proposed to be described: And the said bishop did then, to wit, on the day and year last aforesaid, consent to the said division and assignment, and did signify such consent under his hand and seal, to wit, at *Camberwell* aforesaid, in the county aforesaid: And afterwards, to wit, on the 13th of *June*, 1842, aforesaid, at the court at *Buckingham Palace*, our sovereign lady the Queen, having taken the said representation into consideration, was pleased, by and

Church of *St. Mary Magdalen* built, pursuant to the *58 G. 3. c. 45.* and *59 G. 3. c. 134.*

Consecration.

Determination of commissioners to assign a district thereto.

Representation thereof to the Queen in council.

Consent of the bishop.

Order in council.

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with the advice of Her privy council, to approve thereof, and to order and direct that the said division and assignment should be made and effected agreeably to the provisions of the statute in such case made and provided: And thereby, then, to wit, on the day and year last aforesaid, the said division and assignment respectively became and were made and effected under and by virtue of the said statutes, to wit, at *Camberwell* aforesaid, in the county aforesaid: And afterwards, to wit, on the day and year last aforesaid, the said district was duly ascertained and marked out by described bounds, and the description of such bounds was duly inrolled and registered, and notice thereof was duly given, as by the said first-mentioned act required: And thereupon, by force of the said statutes, to wit, on the day and year last aforesaid, such district became and was called "The district parish of *St. Mary Magdalen, Peckham*" (being the name given thereto in the instrument so inrolled as aforesaid), and became and was a separate and distinct district parish; and the said church of *St. Mary Magdalen*, so assigned to such district (being duly consecrated for that purpose,) became and was the district parish church of the said district parish of *St. Mary Magdalen, Peckham*, for all ecclesiastical purposes, in manner as in and by the said acts respectively provided; and the said last-mentioned church (the same having been built and appropriated as and in the manner aforesaid,) became and was a perpetual curacy, and became, and was considered in law as, a distinct benefice and church, that is to say, a benefice presentative, so far as by the said acts in that behalf provided and enacted, to wit, at *Camberwell* aforesaid, in the county aforesaid: And the said *John George Storie*, being, during all the time aforesaid, and remaining, so seised of the advowson of the vicarage of the said church of the parish of *St. Giles, Camberwell*, as aforesaid (out of which the said district of *St. Mary*

District duly ascertained

District church,

a perpetual curacy.

Plaintiff being seised of the advowson of the vicarage of another church, became seised of

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Magdalen, Peckham, had been and was so taken as aforesaid), thereby then became seised, as of fee and right, of the perpetual right of presentation or nomination and appointment of the spiritual person to be the incumbent of, or to serve, the said district church of *St. Mary Magdalen, Peckham,* in manner as in the said acts respectively in that behalf provided, that is to say, upon and after the death or other avoidance of the said Rev. *John George Storie,* clerk, the then incumbent of the said parish of *St. Giles, Camberwell,* or upon and after the voluntary resignation of the said district church by the said incumbent of the said last-mentioned parish, to wit, at *Camberwell* aforesaid, in the county aforesaid: And the said *John George Storie* being and remaining so seised of the said advowson of the vicarage of the church of *St. Giles, Camberwell,* and of the said right of presentation or nomination and appointment to the said district church of *St. Mary Magdalen, Peckham,* as respectively aforesaid, afterwards, to wit, on the 20th of *May,* 1843, the said church of *St. Giles, Camberwell,* duly became and was vacant, to wit, by the resignation of the said *John George Storie,* to wit, at *Camberwell* aforesaid, in the county aforesaid,—which said resignation was then and there duly accepted by the said *Charles Richard,* as, and being, such bishop as aforesaid: And thereupon the said *John George Storie,* being and remaining so seised as respectively aforesaid, to wit, on the 28th of *October,* 1843, aforesaid, at the parish of *St. Giles, Camberwell,* aforesaid, in the county aforesaid, presented to the last-mentioned church, being so vacant as aforesaid, or prayed the said *Charles Richard,* as, and being, such bishop as aforesaid, to admit himself, the said *John George Storie,* clerk, who, on his own presentation or prayer as aforesaid, was duly admitted, instituted, and inducted into the same, in the time of

the perpetual right of presentation to the district church.

Mother church vacant by the resignation of the incumbent.

Plaintiff presents himself.

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Resignation by the curate of the district church.

peace, in the time of our sovereign lady *Victoria*, the now Queen of *Great Britain*, to wit, on the day and year last aforesaid: And, afterwards, and whilst the said *John George Storie* was and remained so seised of the said right of presentation or nomination and appointment to the said district church of *St. Mary Magdalen, Peckham*, the Rev. *James Sydney Darvell*, clerk,—which said *James Sydney Darvell* had been and was, at the time of the consecration of the said district church, and the division and assignment of the said district parish as respectively aforesaid, appointed by the then incumbent of the said church of *St. Giles, Camberwell*, to wit, the said *John George Storie*, clerk, and licensed, to wit, by the said *Charles Richard*, as, and being, such bishop as aforesaid, as, and to be, the stipendiary curate to serve the said district church,—resigned the stipendiary curacy of the said district church of *St. Mary Magdalen, Peckham*, to wit, at *Camberwell* aforesaid, in the county aforesaid; which said last-mentioned resignation was then and there accepted by the said *Charles Richard*, as, and being, such bishop as aforesaid: And thereupon, to wit, on the day and year last aforesaid, and whilst the said *John George Storie* was and remained so seised of the said right of presentation or nomination and appointment to the said district church as aforesaid, to wit, on the day and year last aforesaid, the said district church of *St. Mary Magdalen, Peckham*, had become and was vacant, no spiritual person having ever theretofore been instituted or licensed as the perpetual curate of the said district church, or presented, nominated, or appointed to the perpetual curacy of the said district church: And that it then and there belonged, and now belongs to the said *John George Storie* to present or nominate and appoint a fit spiritual person to the said district church, so being vacant as aforesaid; but that the said bishop would not permit him so to do, and unjustly hindered him,—

Church vacant.

Plaintiff entitled to present.

Obstructed.

wherefore he, the said *John George Storie*, said he was injured, &c.

Second plea.

Second plea, — that the said *John George Storie* ought not to have or maintain his said action against the said bishop, because he said, that, after the passing of an act of parliament passed in the session of parliament holden in the first and second years of the reign of Her Majesty Queen *Victoria*, intituled "An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and after the building and consecration of the said church of *St. Mary Magdalen*, and the making of the representation and order in council, and the effecting of the division and assignment of the said district parish of *St. Mary Magdalen*, as in the declaration respectively mentioned, to wit, on the 1st of *November*, 1843, the said church of *St. Giles* in the declaration mentioned, became vacant, to wit, by the resignation thereof then and there made by the said *John George Storie* to, and accepted by, the said bishop, as ordinary thereof: that the said *John George Storie* was thereupon then and there admitted, instituted, and inducted, upon his own prayer or presentation, into the said church of *St. Giles*, as in the declaration mentioned,— which last-mentioned church was then and there a benefice with cure of souls, within the meaning of the said act: that the net yearly value of the said churches of *St. Giles* and *St. Mary Magdalen*, jointly, then and there greatly, to wit, by 500*l.*, exceeded the sum of 1000*l.*: that the church of *St. Mary Magdalen*,— which the said *John George Storie* had, up to the time of his resignation as aforesaid, held together with the said church of *St. Giles*, as one church, and which church of *St. Mary Magdalen*, upon a district being assigned thereto, as in the declaration mentioned, became and was, and thence hitherto had been, and continued to be, a benefice with cure of souls

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in the diocese of the said bishop, to wit, at *Camberwell* aforesaid, in the said county,— thereupon, then and there, by reason of the premises, became and was vacant, and it then and there belonged to the said *John George Storie* to present, nominate, and appoint a clerk to the said church of *St. Mary Madgalen;* of which said avoidance, and of all which premises, the said *John George Storie* then and there had notice: that the said church of *St. Mary Magdalen,* so having become and being vacant as aforesaid, was, and continually remained, so vacant for and during the period of eighteen calendar months from and immediately after such avoidance and notice as aforesaid, and also for and during the full period of eighteen calendar months from and immediately after the day of such avoidance and notice as aforesaid, to wit, for four years, to wit, at *Camberwell* aforesaid, in the county aforesaid, neither the said *John George Storie,* nor the ordinary, nor the metropolitan, nor any other person whatsoever, having during all the time last aforesaid presented, nominated, or appointed a clerk thereto, and, by reason thereof, the said last-mentioned church devolved to our said sovereign lady the Queen, and it now belongs to our said sovereign lady the Queen, to present, nominate, and appoint a clerk to the said last-mentioned church so vacant as aforesaid, to wit, at &c.; and our sovereign lady the Queen has not as yet presented, nominated, and appointed a clerk thereto: that, after the said period of eighteen calendar months had elapsed, and not before, to wit, on the 1st of *May,* 1848, the said *John George Storie,* who, at the time of the last-mentioned church becoming vacant as last aforesaid, was, and thence continually to the pleading of the plea had been, seised of the advowson of the last-mentioned church, presented, nominated, and appointed a clerk, to wit, the said *John George Storie,* to the said bishop, to be admitted,

licensed, instituted, and inducted to the said last-mentioned church, to wit, at *Camberwell* aforesaid, in the county aforesaid: and that thereupon the said bishop refused to admit, license, institute, or induct the said *John George Storie*, upon his presentation, nomination, and appointment so made as aforesaid, as he lawfully might for the cause aforesaid; which was the disturbance in the declaration mentioned: verification, and prayer of judgment.

Third plea.

Third plea,— that the said church of *St. Mary Magdalen* in the declaration mentioned, upon such assignment of a district being made, as in the declaration mentioned, became and thence continually had been, and still was, a benefice with cure of souls, in the diocese of the said bishop, to wit, &c.: that the resignation by the said *John George Storie* of the said church of *St. Giles, Camberwell*, in the declaration mentioned, was, so as in the declaration mentioned, made and accepted, and notice of such acceptance was given by the said bishop to the said *John George Storie*, to wit, at &c., more than eighteen calendar months before any presentation, nomination, or appointment was made to the church of *St. Mary Magdalen* in the declaration mentioned, or any disturbance was made by the said bishop in respect of the said last-mentioned church, to wit, on the 28th of *October*, 1843: verification, and prayer of judgment.

Fourth plea.

Fourth plea, — that the said church of *St. Mary Magdalen* in the declaration mentioned, upon such assignment of a district being made as in the declaration mentioned, became, and thence continually had been, and still was, a benefice with cure of souls, in the diocese of the said bishop, to wit, at *Camberwell* aforesaid, in the county aforesaid: that the said admission, institution, and induction of the said *John George Storie* to the said church of *St. Giles, Camberwell*, in the declaration

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mentioned, was, so as in the declaration mentioned, made, to wit, at *Camberwell* aforesaid, in the county aforesaid, after the passing of an act of parliament passed in the session of parliament holden in the first and second years of the reign of Her Majesty Queen *Victoria*, intituled "An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy," and more than eighteen calendar months before any presentation, nomination, or appointment was made to the said church of *St. Mary Magdalen* in the declaration mentioned, or any disturbance was made by the said bishop in respect of the said last-mentioned church; the said church of *St. Giles* having, during all the time in the declaration and this plea mentioned, been a benefice with cure of souls within the meaning of the said act, to wit, at *Camberwell* aforesaid, in the county aforesaid: and that the net yearly value of the said churches of *St. Giles* and *St. Mary Magdalen*, jointly, then, to wit, on the day when the said *John George Storie* was admitted, instituted, and inducted to the said church of *St. Giles*, as in the declaration mentioned, greatly, to wit, by 500*l.*, exceeded the sum of 1000*l.*, to wit, at *Camberwell* aforesaid, in the county aforesaid: verification and prayer of judgment.

Protestation and special demurrer to the second plea.

And, as to the plea of the said bishop by him secondly above pleaded, the said *John George Storie*, not acknowledging anything above alleged by the said bishop in his said second plea to be true, but protesting that the said church of *St. Mary Magdalen* did not become, nor was, vacant at the time nor in the manner in the said second plea mentioned,—and further protesting that it did not belong to the said *John George Storie* to present, nominate, or appoint a clerk to the said church of *St. Mary Magdalen* until long after the time in the said plea mentioned,—and further protesting that the said *John George*

Storie did not have notice of the said alleged avoidance, or of the premises in the said second plea in that behalf mentioned, — and further protesting that the said church of *St. Mary Magdalen* was not, nor remained, vacant for or during the period of eighteen calendar months in the said second plea mentioned, or during any period of eighteen months, — and further protesting that the said *John George Storie* did present, nominate, and appoint a clerk to the said last-mentioned church within the period of eighteen calendar months next after the same had first become, and was, vacant, — and further protesting that the said last-mentioned church did not devolve to our sovereign lady the Queen, nor did it then belong to our said lady the Queen to present, nominate, or appoint a clerk to the said last-mentioned church, — and, lastly, protesting that the said second plea is wholly untrue in substance and in fact; — nevertheless, the said *John George Storie* said that he, by reason of anything by the said bishop in his said second plea alleged, ought not to be barred or precluded from having and maintaining his said action against him the said bishop, because he said that the said second plea, and the matters therein contained, were not sufficient in law to preclude or bar the said *John George Storie* from having or maintaining his said action against him the said bishop, and that he the said *John George Storie* was not obliged or bound by the law of the land in any manner to answer to the said second plea, in manner and form as the same was above pleaded, — verification; wherefore, for the insufficiency of the said second plea in this behalf, the said *John George Storie* prayed judgment against the said bishop, and his damages by him sustained by reason of the said hindrance, together with a writ to the said metropolitan, to be adjudged to him &c.: And the said *John George Storie*, according to the form of the statute in such case made and provided,

Causes of demurrer.

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states and shews to the court here the following causes of demurrer, amongst others, to the said second plea, that is to say, — that the said bishop ought not to be received, nor can by law be received or allowed, to set up, shew, or defend the right or title of our said lady the Queen, or the right or title of any other person, to the patronage of the said church of *St. Mary Magdalen*, or any such right or title to present, nominate, or appoint a clerk thereto, inasmuch as the said church is still vacant (as is confessed by the said plea), and neither has the said bishop, nor has the said metropolitan, nor has our said lady the Queen, nor has any other person than the said *John George Storie*, collated or presented thereto, or given or conferred the same to or upon any clerk, or elected so to do, upon, or for, or by reason of the said alleged lapse, or in any other manner; —that the said plea does not shew any cause or matter sufficient to enable the said bishop to counterplead the right or title of the said *John George Storie* to present, nominate, or appoint a clerk to the said last-mentioned church, being so vacant as aforesaid; — that the said second plea does not sufficiently shew that the said last-mentioned church had been vacant, in such manner or so that a clerk might or could have been inducted, instituted, or admitted therein, or presented, nominated, or appointed thereto, for the full period of eighteen calendar months before the said *John George Storie* nominated, presented, or appointed a clerk thereto; — that the said second plea does not sufficiently allege or shew the day or time when the said church devolved to our said lady the Queen, as alleged in the said plea; — that the said second plea does not sufficiently, and with certainty, shew when, and at what time, and how, and on what act or event, the said church of *St. Mary Magdalen* became vacant, that is to say, whether the same became vacant on the resignation of the said *John*

George Storie of the said church of *St. Giles*, or the acceptance of such resignation, or the notice thereof, in the said second plea respectively mentioned, under and by force of the statutes relating to church-building, in the said declaration mentioned, or whether the said *John George Storie* continued to hold the said church of *St. Mary Magdalen* after such resignation, and until his said re-induction, re-institution, or re-admission into the said church of *St. Giles*, and whether the said church of *St. Mary Magdalen* then became vacant under and by force of the statute relating to the holding of benefices in plurality, in the said second plea mentioned, or how otherwise; — that the said plea is double and multifarious, in this, to wit, that it suggests, and relies on, two or more distinct and unconnected acts and matters, done and occurring at different times, as each causing the said church of *St. Mary Magdalen* to become vacant, that is to say, first, the resignation of the said church of *St. Giles*, or the acceptance of such resignation, or the notice thereof, and, secondly, the re-admission, re-institution, or re-induction of the said *John George Storie* to the said last-mentioned church; — that the said second plea is repugnant and inconsistent, in this, to wit, that the same supposes that the said church of *St. Mary Magdalen* became and was vacant on the resignation by the said *John George Storie* in the said second plea mentioned, of the said church of *St. Giles*, or the acceptance of such resignation, or notice thereof, under and by force of the church-building acts, and yet that the said second plea also supposes that he continued to hold the said church of *St. Mary Magdalen* until his re-induction or re-admission to the said church of *St. Giles*, and that thereupon the said church of *St. Mary Magdalen* became void by force of the said statute relating to pluralities; — that the matter relating to the said last-mentioned statute, is irrelevant, and the intro-

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duction thereof into the plea tends to embarrassment and prolixity of pleading; — that the said church of *St. Mary Magdalen* is not shewn to have been a benefice with cure of souls, within the meaning of the last-mentioned act, at the time when the same is alleged in the plea to have become vacant; — that the said second plea does not allege or shew that the said *John George Storie* was admitted, instituted, inducted, or licensed to the said church of *St. Giles*, contrary to the provisions of the act in the said second plea mentioned;— that the same does not shew that the said churches of *St. Mary Magdalen* and *St. Giles* were not within the exceptions in such act made and provided;—that it appears in and by the declaration, that *James Sydney Darvell*, clerk, at the time of the consecration of the said district church of *St. Mary Magdalen*, and of the division and assignment of the said district parish, had been and was duly appointed and licensed a stipendiary curate to serve the said last-mentioned church, and continued to fill the said last-mentioned church, as such stipendiary curate, until the year 1848, and that the said last-mentioned church could not, and did not, become, and was not, vacant, at least so as to be subject to lapse, until the said *James Sydney Darvell* ceased to be such stipendiary curate; — that the second plea does not allege or shew that the licence of the said stipendiary curate was revoked or determined; — that the said second plea ought to have shewn how. and in what manner, the said *James Sydney Darvell* ceased to be such stipendiary curate as aforesaid, and to have shewn that the said church of *St. Mary Magdalen* was and remained vacant for eighteen calendar months after the said *James Sydney Darvell* ceased to be such stipendiary curate; — that it does not sufficiently appear how or in what way the said period of eighteen calendar months in the said second plea mentioned, is computed, or at or from what date such

period commenced; — that the said second plea is argumentative, and amounts to a traverse of the right of the said *John George Storie*, as alleged in the declaration, and ought to have concluded to the country; — that the said second plea does not sufficiently deny, or confess and avoid, the declaration, &c.

The third and fourth pleas were also demurred to, on similar grounds.

Manning, Serjt. (with whom was *W. H. Cooke*), in support of the demurrers. (*a*) It is clearly not compe-

(*a*) The points marked for argument on the part of the plaintiff, were as follows: —

"That the second plea is bad for the following, amongst other, reasons, — first, that the defendant cannot counterplead the plaintiff's title, the defendant not having collated by lapse, — secondly, that the plea does not sufficiently shew that the plaintiff has lost the right to present, or that the same has lapsed, — thirdly, that the right of presentation could not lapse, as supposed by the plea, inasmuch as the district church was filled and served by a licensed stipendiary curate (see the statutes, 1 & 2 *Vict. c.* 107. *s.* 13., 2 & 3 *Vict. c.* 49. *s.* 11., and 59 *G.* 3. *c.* 134. *s.* 12.), — fourthly, that the plea does not sufficiently shew when or upon what event the alleged title of our lady the Queen to present, accrued, — fifthly, that the plea is double and repugnant, in relying on the resignation of the church of *St. Giles*, and also on the re-acceptance thereof, as vacating the district church, — sixthly, that the plea is ambiguous and uncertain, — seventhly, that the plea does not traverse or confess and avoid the declaration, — eighthly, that the plea does not shew title in the defendant, or any other person through or under whom he claims or acts, — ninthly, that the district church is not alleged to be full, — tenthly, that the plea does not shew that the acceptance of the church of *St. Giles* was contrary to the statute 1 & 2 *Vict. c.* 106., or that a vacancy was caused thereby:

"That the third and fourth pleas respectively are bad, for the following, amongst other, reasons, — first, that the defendant cannot counterplead the plaintiff's title, — secondly, that the pleas do not shew that the plaintiff has lost the right to present, or that it had lapsed, or devolved to, or is vested in, any other person, — thirdly, that the pleas do not shew when or how the district church became vacant, or that it was vacant for eighteen months before a presentation or disturbance, — fourthly, that the district church is not alleged to be full, — fifthly, that the pre-

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tent to the bishop to counterplead the title of the plaintiff, as patron, by setting up the Queen's title by lapse. The leading case upon this subject is that of *Elvis* v. *The Archbishop of York*.(a) There, Sir *William Elvis* brought a *quare impedit* to present to the church of *Badworth*, and declared that Sir *Gervas Elvis*, Knt., was seised of the manor of *Sanby*, to which the said advowson was appendant in fee, and held the same of the King, and, so seised, did present one *George Turpin*, his clerk, who was admitted and instituted, &c.; that the said Sir *Gervas*, so seised, was attainted of felony, and executed(b); that, by force thereof, the King was seised of the said manor *ad quod* &c., in fee, in right of his crown, and, so seised, did grant the manor and advowson thereunto belonging, to the plaintiff and his heirs, *adeo plenè et integrè, &c.*; and that, by virtue thereof, he entered, and was seised thereof in fee, and, so being seised, the church became void, by the death of *Turpin*, whereby it belonged to the plaintiff to present, and the defendants did disturb him, &c. The archbishop,—confessing the seisin of Sir *Gervas Elvis*, and the presentation of *Turpin*, and the attainder and

sentation was not subject to lapse during the licence and incumbency of the stipendiary curate,—sixthly, that the pleas do not traverse or confess and avoid the declaration,—seventhly, that the pleas are vague, ambiguous, and uncertain,—eighthly, that the pleas are wholly irrelevant,—ninthly, that the pleas do not shew title in the defendant, or other person under whom he claims or acts,—tenthly, that the pleas do not shew that any person other than the plaintiff has ever presented to the said district church, or elected so to do:

"And that the fourth plea is bad,—eleventhly, because it does not shew that the acceptance of the church of *St. Giles* was contrary to the statute 1 & 2 *Vict. c.* 106.,—twelfthly, that the re-admission, institution, and induction to the church of *St. Giles*, and the time thereof, respectively, were immaterial, and that the plaintiff could not take issue thereon."

(a) *Hobart*, 315., Sir *W. Jones*, 4., *per nom. Hellwayes & Archevesque de Yorke & Al.*

(b) As to the share of *Sir Gervas Helwis* in the murder of *Sir Thomas Overbury*, see *Bacon*'s Works, by *Birch*, Vol. IV. p. 460., Vol. VI. pp. 107, 8.

execution, as the plaintiff had set forth in his declaration, — pleaded, that, by virtue of the said attainder, the King was seised of the manor *ad quod* &c., in fee, in right of his crown, and, so seised, the church became void by the death of *Turpin*, whereby the King, to the church, being void, did present to the said archbishop, *Thomas Bishop*, whom he caused to be admitted, instituted, and inducted, as it was lawful for him to do, &c.: whereupon the plaintiff demurred. Lord *Hobart*, in delivering judgment, after having adverted to the form of pleading for the ordinary and incumbent at common law, proceeds, — "Now we will see how it stands this day, and what change is made by the statute 25 *E.* 3. *c.* 7., *pro clero*, stat. 3., and what is the true meaning and use of that law, which is thus: — When an archbishop, bishop, or other ordinary, hath given a benefice of right devolute unto him by lapse of time, and after the King presenteth, and taketh his suit against the patron, who percase will suffer that the King shall recover without action tried, in deceit of the ordinary, or the possessor of the said benefice, that, in such cases, and in all other cases like, where the King's right is not tried, the archbishop, or bishop, ordinary, or possessor, shall be received to counterplead the title taken for the King, and to have his answer, and to shew and defend his right upon the matter, although that he claim nothing in the patronage in the case aforesaid. The particular cause of this law, is, for the relief only of the ordinary that hath collated by lapse, and of the clerk that is so collated, that they may both plead to the title against the King; which when you consider, it was a necessary law as against the King more than against common patrons; for, the King not being bound by lapse of time, if the common patron suffered a lapse, and the bishop collated lawfully, yet, if the King, pretending himself patron, brought a *quare impedit* against

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the ordinary and incumbent, there was no means for them to save themselves, since they could not deny the King's title, and maintain the patron's, in whose default the lapse took place; but the statute gives remedies likewise *in like cases* by express words, so that cases of like nature are rather remedied by letter than equity. And therefore, first, in the case of lapse, a common person might by practice have turned out a lawful collatee in one only case, and that was this: A common person, no true patron, presents within six months, and the true patron himself presents not in time, whereupon the ordinary collates by lapse, against whom the pretender brings a *quare impedit*, because his clerk was refused, wherein he must needs prevail if his title be good: and it must be taken for good, because neither ordinary nor incumbent could deny it; for, *de non apparentibus et de non existentibus, eadem est ratio.* This is one of the *like* cases meant in the statute; for, in all other cases, the lapse is an equal title against all common persons. But the commonest like case, and, that which extends furthest, is, the purview; for, every incumbent that is called a possessor, as well by presentment as by collation, is allowed, by the words of the law, to counterplead the King's title, and to shew and defend his own right upon the matter, though he claim nothing in the patronage in the case aforesaid. Note all the words, for they have all their weight; for, first, the incumbent must be a possessor; so that, if he have his presentation, admission, and institution upon the lawful title, yet remains, as he was before, under the mischief of the common law, because he is not a possessor, according to the letter of the law, till induction. Again, I say, that, though he be a possessor, he must, by the letter and meaning of this law, as well shew and defend his own right, as counterplead his adversary's. And therefore clearly he cannot make himself parson impersonee

of the presentation of *J. S.*, and defend himself by the title of *J. D.*, under whom he claims not, though that were sufficient to destroy the plaintiff's title, by confessing and avoiding, or the like; neither can he counterplead the plaintiff's title, but must also make a title to himself, by the word and meaning of this law,—which I speak not to bind the incumbent by the patron's plea, whereof I will speak hereafter, when I come to the incumbent's plea. But, touching the ordinary's plea upon this statute, I hold plainly that he can no otherwise plead than he could at the common law, but only where he hath collated actually by lapse; for, though the incumbent of presentation be also admitted to plead, by the meaning of this law, under the word 'like case,'—because the case is like indeed,—yet the ordinary's case before actual collation, is no ways like in case; for, he hath gotten no interest for himself, nor his clerk, in the church. And, therefore, if the incumbent *instituted* only at the presentation of another, be not within the relief, much less shall the ordinary, that hath no interest, but an office only, that ought to be indifferent to all patrons, and maintain no side." That authority was recognised in the recent case of *Apperley* v. *The Bishop of Hereford* (*a*), where it was held, that the ordinary cannot, before he has collated, counterplead the patron's title. This objection applies to all the pleas.

The next objection to the second plea, is, that it does not sufficiently shew that the plaintiff has lost the right to present, or that there has been any lapse. It is difficult to see what answer can be given to that. [*Wilde*, C. J. You contend, that, until the licence is revoked, the church continues full. *H. Hill.* The real question is, whether the district church was filled

(*a*) 9 *Bingh.* 681., 3 *M. & Scott*, 102.

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by the incumbent of the mother church. The defendants will mainly rely on the 58 *G.* 3. *c.* 45. *ss.* 13. 21 to 25., and 67., and 59 *G.* 3. *c.* 134. *ss.* 12, 13. 19.]

58 *G.* 3. *c.* 45. *s.* 21.

The 58 *G.* 3. *c.* 45. *s.* 13. enables the commissioners to grant money for the building of additional churches in parishes of certain population, and in want of accommodation. The 21st section enacts "that, in any case in which the said commissioners shall be of opinion that it is not expedient to divide any populous parish or extra-parochial place into such complete, separate, and distinct parishes as aforesaid, but that it is expedient to divide the same into such ecclesiastical districts as they, with the consent of the bishop, signified under his hand and seal, may deem necessary for the purpose of affording accommodation for the attending divine service according to the rites of the united church of *England* and *Ireland*, to persons residing therein, in the churches and chapels already built, or in additional churches or chapels to be built therein, and as may appear to such commissioners to be convenient for the enabling the spiritual person or persons, who may serve such churches or chapels, to perform all ecclesiastical duties within the districts attached to such respective churches and chapels, and for the due ecclesiastical superintendence of such district, and the preservation and improvement of the religious and moral habits of the persons residing therein, — the said commissioners shall represent such opinion to His Majesty in council, and shall state in such representation the bounds by which such districts are proposed to be described; and if thereupon His Majesty in council shall think fit to direct such division to be made, such order of His Majesty in council shall be valid and good in law for the purpose of effecting such division; or, in any case in which the said commissioners shall be of opinion that it is not expedient to make any such di-

vision into such ecclesiastical districts as aforesaid, the said commissioners may build, or aid the building of, any additional chapels in any such parishes or extra-parochial places, to be served by curates to be respectively nominated and appointed by the respective incumbents of the churches of the respective parishes or extra-parochial places, and licensed by the bishop of the diocese; such curates to be paid such salaries as shall be assigned by the said commissioners, under the provisions of this act, in manner hereinafter directed." The 22nd section enacts "that the several new parishes created by any such complete division as aforesaid, and also the several districts of any parish, or extra-parochial place, where any such division thereof shall have been so made as aforesaid, shall be ascertained and marked out by described bounds, and the description of such bounds shall be inrolled in the high court of Chancery, and be registered in the office of registry of the diocese, and notice thereof given in such manner as the commissioners shall deem necessary and direct for that purpose." By s. 23. the King in council is authorised to alter such boundaries. The 24th section enacts "that such boundaries shall continue, and be, the boundaries of such parishes or districts respectively, unless so altered, and such districts shall thereupon become and be called district parishes, by such names as shall be given to them respectively in the instrument so inrolled as aforesaid, and shall become and be separate and distinct district parishes, and the churches and chapels respectively assigned to such districts, shall, when duly consecrated for that purpose, become, and be, the district parish churches of such district parishes, for all purposes of ecclesiastical worship, and performance of ecclesiastical duties, and as to all marriages, christenings, churchings, and burials, and the registry thereof, respectively, within the same, and in relation to all fees,

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oblations, and offerings, and the demanding, suing, and prosecuting for, and recovering the same, and as to all other purposes whatsoever, save and except as is in this act particularly excepted." The 25th section enacts "that every church and chapel built, or acquired, under the provisions of this act, and appropriated to any such district parish so made under the provisions of this act, shall be deemed a perpetual curacy, and shall be considered in law as a benefice presentative, so far only as that the licence thereto shall operate in the same manner as institution to any such benefice, and shall render voidable other livings, in like manner as institution to any such benefice; and the spiritual person serving the same, shall be deemed the incumbent thereof; and such incumbents shall have perpetual succession, and shall be, and are hereby declared to be, bodies politic and corporate, and may receive and take such endowments in lands or tithes, or both, or any such augmentation, as shall be granted to them or their successors; and all such incumbents, and all persons presenting or appointing any such incumbents, shall respectively be subject to all jurisdictions and laws ecclesiastical or common, and to all provisions, regulations, penalties, and forfeitures contained in any acts of parliament in force relating thereto respectively; and, in case of any failure or neglect, in not presenting or nominating any such incumbent for the space of six months, such presentation or appointment shall thereupon lapse, as in cases of actual benefices." And the 67th section enacts "that the nomination or appointment of the spiritual person to serve all such district churches and chapels, shall belong to the patron of the church of the parish or extra-parochial place out of which such district shall be taken; and the spiritual person so presented and instituted or licensed (as the case may be) by the bishop of the diocese, shall be subject to the same jurisdiction and

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visitation as the incumbent of the parish now is." The 12th section of the 59 *G.* 3. *c.* 134. enacts "that all churches which shall be built, or acquired, under the provisions of the said act (58 *G.* 3. *c.* 45.) or this act, whether belonging to parishes completely divided, or to district parishes, shall, immediately after the consecration thereof, become and be deemed to be, and be, district benefices and churches for all ecclesiastical purposes: provided always, that, during the incumbency of the then existing incumbent of the parish, except as hereinafter excepted, such churches shall be served by licensed stipendiary curates, appointed by the existing incumbent, and subject to all the laws in force relating to stipendiary curates, except as to the assigning salaries to such curates by the bishop of the diocese; and every such existing incumbent shall, until his death or other avoidance, continue to hold all the churches of the several divisions of his parish as if they were one church, unless he shall voluntarily resign one or more of them; any statute or law against plurality of benefices, or anything contained in the said recited act or any other act or acts of parliament, to the contrary, notwithstanding." The 13th section provides and enacts "that the right of presentation and appointment of the spiritual persons to be the respective incumbents of, or to serve, the churches of the several parishes created by the complete division of any parish, under the provisions of the said recited act or this act, shall, in every case, belong to the patron of the church of the original parish; and the exercise of such right of presentation or appointment shall commence on the death, or other avoidance, of the existing incumbent, except in any case in which the division of any parish shall have been made, or in which the commissioners shall have declared their intention of dividing any parish, before or during any avoidance, in which cases

59 *G.* 3. *c.* 134. *s.* 12.

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the exercise of such right of presentation or appointment shall commence upon the consecration of the church or churches respectively of any such division; and the several churches erected in and for such divisions respectively, shall, immediately upon consecration, become benefices, and subject to all the laws in force concerning presentations and appointments to benefices and churches, and lapse, and all other laws, provisions, and regulations relating to the holding of benefices and churches: provided always that the spiritual care and superintendence of every parish so divided, during avoidance, shall, until incumbents shall have been presented or appointed for the divisions thereof, continue in the spiritual person who shall be the incumbent of the original parish; and such spiritual person shall receive all emoluments accruing and arising within the parish during such superintendence." And the 19th section enacts "that no chapel built, or acquired, under the provisions of the said recited act, which shall be situate in any district parish made a parish for ecclesiastical purposes under the provisions of the said recited act, and which shall not be, or be made, the church of such district, shall be, or be deemed to be, a perpetual curacy, or be considered in law as a benefice presentative, under the provisions of the said recited act." Reliance will also probably be placed, on the other side, upon the 4th section of the 1 & 2 *Vict.* *c.* 107., which enacts, "that, except as thereinafter provided, no spiritual person holding a benefice with a population of more than three thousand persons, shall accept and take, and hold therewith, any other benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than five hundred persons; nor shall any spiritual person holding a benefice with a population of more than five hundred persons, accept and take, to hold therewith, any other

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1 & 2 *Vict.* *c.* 107. *s.* 4.

benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than three thousand persons; nor shall any spiritual person hold together any two benefices, if, at the time of his admission, institution, or being licensed to the second benefice, the value of the two benefices jointly shall exceed the yearly value of 1000*l.*" The plaintiff, however, relies upon the 13th section of the 1 & 2 *Vict. c.* 107., which enacts, "that, in all district churches and district chapelries, the licence of the stipendiary curate appointed to serve the chapel of such chapelry, shall not be rendered void by the avoidance of the church of the parish, or district parish, in which such chapel is situate, unless the same shall be revoked by the bishop of the diocese under his hand and seal; but such licence shall continue in force, unless otherwise directed, as aforesaid, by such bishop, notwithstanding the avoidance of the church of the parish or district parish, any statute, law, canon, or usage to the contrary notwithstanding." That modifies the provisions of the former statutes: it dispenses with the necessity of a new appointment. The effect of the statute is, to make the stipendiary curate the incumbent. On the death or avoidance of the incumbent, the interest of the stipendiary curate, would, but for the 1 & 2 *Vict. c.* 107. *s.* 13., be gone. The effect of that section is, to make him continue curate until a new one has been presented to the bishop to be licensed. The incumbent has appointed a stipendiary curate to the district church: the incumbent dies, or resigns: the consequence is, that the patron *must* present to the mother church, and *may* present a proper curate to the district church; but, until he does so, the stipendiary curate continues to be the curate of the district church. [*Maule*, J. Here, the church of *St. Giles, Camberwell,* is vacated,—does that vacate the district church of *St. Mary Magdalen,*

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Peckham?] No: the statute 1 & 2 *Vict. c.* 107. *s.* 13. prevents that. [*Maule*, J. The patron has a right to present; and the bishop may revoke the licence of the stipendiary curate: is the curacy full?] Yes. [*Maule*, J. Full of a person who may at any moment be turned out!]

The next ground of objection to the pleas, is, that it is not sufficiently shewn when, or upon what event, the title of the Queen to present accrued. It does not appear whether it is the avoidance or the notice that is relied upon as the starting point from which the eighteen months are to run. [*Maule*, J. That is immaterial, the latest of those events being remote enough. If the time runs from the resignation, the allegation must be taken to mean that; if from the notice, it means that: whatever is unnecessary, will be rejected as surplusage.]

Hugh Hill (with whom was *Sumner*), for the defendant.(*a*) On the face of the declaration, the plain-

(*a*) The points marked for argument on the part of the defendant, were as follows:—

"That the facts admitted on the pleadings being, that the district church of *St. Mary Magdalen* was carved out of the plaintiff's vicarage of the parish of *St. Giles*, under the 58 *G.* 3. *c.* 45. and 59 *G.* 3. *c.* 134., that Mr. *Darvell* was then appointed and licensed stipendiary curate of the district church, that the plaintiff resigned the mother church, and was, upon his own presentation, re-instituted and inducted thereto more than eighteen months before he presented to the district church, Mr. *Darvell* having resigned the stipendiary curacy of the district church in the interval, but no perpetual curate having been appointed thereto, — first, the district church became vacant, either by the plaintiff's resignation of or re-institution and induction to the mother church, — secondly, and this though Mr. *Darvell* was, at both those times, stipendiary curate of the district church, — thirdly, consequently, that, no perpetual curate having been appointed within eighteen months, the district church lapsed to the crown under the 58 *G.* 3. *c.* 45. *s.* 25., — fourthly, that the enactment (1 & 2 *Vict. c.* 107.

tiff shews that he is both patron and incumbent. He alleges that he resigned the living of *St. Giles, Camberwell,* but not the district church of *St. Mary Magdalen.* [*Maule,* J. Though he might resign the district church without resigning the mother church, he could not resign the latter, and retain the former.] It is submitted that he could. Being possessed of the incumbency of *St. Giles,* Dr. *Storie* was disqualified from being presented to the district church. His incumbency of the mother church having ceased on his resignation, he is expressly prevented from holding the district church, by the 1 & 2 *Vict. c.* 106. *s.* 11., which enacts, "that, if any spiritual person holding any cathedral-preferment or benefice, shall accept any other cathedral-preferment or benefice, and be admitted, instituted, or licensed to the same, contrary to the provisions of this act, every cathedral-preferment or benefice so previously held by him, shall be and become *ipso facto* void, as if he had died or had resigned the same, any law, statute, canon, usage, custom, or dispensation to the contrary notwithstanding." Dr. *Storie* resigns *St. Giles*'s: he presents himself *de novo* to *St. Giles.* Mr. *Darvell* resigns the district church; Dr. *Storie* then presents himself to the district church. [*Maule,* J. He thereby vacates *St. Giles.*] Only if his holding the two livings is incompatible with the 21 *H.* 8. *c.* 13. [*Maule,* J. No doubt, these two livings

s. 13.), that, in all district churches and district chapelries, the licence of the stipendiary curate appointed to serve the chapel of such chapelry, shall not be rendered void by the avoidance of the church of the parish or district parish in which such chapel is situate, unless the same shall be revoked by the bishop of the diocese, under his hand and seal, does not prevent the district church becoming vacant, or lapse to the crown taking place, under the circumstances stated, — fifthly, that it is perfectly competent to the defendant to set up the title of the crown to present by way of lapse, in opposition to the title of the plaintiff, — sixthly, that the pleas are good in point of form."

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cannot be held together: it is the first that is void. There is nothing to prevent Dr. *Storie* from holding *St. Mary Magdalen*, giving up *St. Giles*.] It is submitted, that, on Dr. *Storie*'s resignation of *St. Giles*, *St. Mary Magdalen* was not full of Mr. *Darvell*, so as to prevent a lapse.

Although it is true that the ordinary cannot, as against the patron, counterplead by a lapse to himself, yet the case is different where the lapse is to the crown. In *Watson*'s Clergyman's Law (*a*), it is said: "After a church is lapsed to the bishop or archbishop, it concerns them to take advantage thereof with all speed, lest the benefit be lost; for, after a church is lapsed to the immediate ordinary, if the patron doth present before he hath filled the church, the ordinary ought to receive his clerk: for, lapse to the ordinary is only an opportunity of executing a trust, *viz.* of seeing the cure supplied, in case of the patron's neglect; which being performed by the patron himself, the ordinary can take no advantage by it: 11 *H.* 4. 80. (*b*); 18 *E.* 3. 21. a. (*c*); 13 *E.* 4. 3. (*d*); 43 *E.* 3. 11. a. (*e*); *Trin.* 18 *H.* 7. *Keilwey*, 50. And by *Hobart*, in *Colt* and *Glover*'s case, p. 154.; 28 & 29 *Eliz.* *Beverley* v. *The Bishop of Canterbury* and *Cornwall* (*g*); *Doctor & Student*, *l.* 2. *c.* 36. If one hath the nomination, and another the presentation, and, the six months being incurred, he that hath the presentation only presenteth to the bishop, before the bishop hath taken benefit of the lapse, without any nomination made to him, in such case the bishop is bound to admit the clerk, as the clerk of the very patron. By *Doderidge*, in his *Complete*

(*a*) Edit. 1747, p. 116, 117.
(*b*) *T.* 11 *H.* 4, fo. 79, 80, pl. 22.
(*c*) *R.* v. *Bishop of Carlisle*, *E.* 18 *E.* 3, fo. 21, pl. 37.
(*d*) *M.* 13 *E.* 4, fo. 3, pl. 5.,
(*e*) *H.* 43 *E.* 3, fo. 10. b., 11. a., pl. 33.
(*g*) 1 *Anderson*, 148.

Parson, Lect. 12. fo. 67. Or, though the patron did not present within his six months, but the ordinary did collate before the expiration thereof, the patron is not thereby barred from presenting, but may present after the six months be expired, and his clerk ought to be received: *Green*'s case (*a*); *Boswell*'s case. (*b*) But, if the bishop, in such case, after the six months, and before any presentation exhibited, hath made a new collation, the patron is barred: 2 *Roll.* 368.; *Co. Litt.* 344. So, though lapse be incurred to the inferior ordinary, and the archbishop doth collate within the inferior ordinary's six months, the patron's clerk, if he be presented, ought to be received; because the collation of the metropolitan is tortious, and doth not put the patron to his *quare impedit*, but is null, and as no collation to the patron: By *Rolle*, in his Abridgment, Vol. ii. p. 368. (*c*) But this is doubted of, and objected, that the wrong is here done to the ordinary only, and not to the very patron. 11 *H.* 4. 80. (*d*) The like law, if lapse be accrued to the metropolitan; for, then, if the patron present to the inferior ordinary, whilst the church remains void, he is bound to receive his clerk, and the metropolitan is barred: *Booton* v. *The Bishop of Rochester* (*e*); *Doctor & Student*, *l.* 2. *c.* 36. But, if either the ordinary of the diocese, or metropolitan, hath collated his clerk, whilst the turn was respectively theirs, although the clerk be not inducted, the patron's clerk, if after that presented, is not to be admitted. *Trin.* 10 *Eliz. Dyer*, 277. Or, if the inferior ordinary, after the time is gone by lapse to the metropolitan, hath collated his clerk to the benefice that is in lapse, although this collation be

(*a*) 6 *Co. Rep.* 22.
(*b*) 6 *Co. Rep.* 50.
(*c*) Translated, 17 *Vin.* Abr. 389, pl. 4.
(*d*) *Suprà*, 88.
(*e*) *Hutton*, 24.

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tortious to the metropolitan, yet it seems that it takes away the presentation of the patron, so that he shall not present, and is only an usurpation upon the metropolitan: By *Finch*, J., at *Somerset* assises; Sir *Francis Popham* v. *The Bishop of Bath and Wells*, 2 *Roll.* 350. 368. (*a*) And thereby the metropolitan is put out of possession, and driven to his *quare impedit*. *Green*'s case, 6 *Co.*. 29. b.; *Boswell*'s case, 6 *Co.* 50.; *Co. Litt.* 344. It hath been a question whether the bishop ought to admit the patron's clerk, after the title of lapse is passed from the metropolitan to the King. *Trin.* 10 *Eliz. Dyer*, 277.; and by *Hobart*, the patron's presentation takes place, after the church is lapsed to the King, if it be exhibited to the ordinary before the King's: in *Colt* and *Glover* v. *The Bishop of Coventry*, *Hobart*, 157. Because the patron's right to present continueth until the title by lapse is executed, and the King's title is not vested in him in this case absolutely, as other titles are, but conditionally, *viz.* if he doth present before the patron: because the King hath it only as supreme ordinary: *Hutton*, 24. But, by others, the turn by lapse is so vested in the King, that, if the patron's, or other person's, clerk be admitted to a church after 'tis come to the King by lapse, the King by *quare impedit* may recover the presentment, and remove such clerk. *Beverley* v. *The Bishop of Canterbury* (*b*); *Baskervile*'s case (*c*); 27 *E.* 3. 85. (*d*); *The Bishop of Lincoln*'s case (*e*); *Cumber* v. *The Bishop of Chichester*, cited in the case of *The King* v. *The Archbishop of Canterbury* and *Prust.* (*g*) And this latter opinion is taken to be the law." In 2 *Bla. Comm.* 277., it is said: "If the bishop doth not collate his

(*a*) 17 *Vin.* Abr. 319, pl. 6.
(*b*) 1 *And.* 148.
(*c*) 7 *Co. Rep.* 28.
(*d*) *M.* 27 *E.* 3, fo. 8, pl. 25. The reference in the text is to the old edition of *Y. B.*
(*e*) Owen, 89.
(*g*) *Hetley*, 124.

own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk: for, as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason, that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage, if he present before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after the lapse to the metropolitan, collate his own clerk, to the prejudice of the archbishop: for, he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But, if the presentation lapses to the King, prerogative here intervenes, and makes a difference; and the patron shall never recover his right till the King has satisfied his turn by presentation: for, *nullum tempus occurrit Regi.*" In 17 *Viner*'s Abridgment, 392., *Presentation* (B. c. 2.), pl. 4., it is said, that, "when a lapse is in the King, he is not compellable to present, and, *till he presents*, the ordinary has the cure *de animis* (*a*), and he shall provide for it; so the difference is between the *cura animarum* and the patronage: *Per Doderidge*, J., 1 *Roll. R.* 464., in the case of *Colt* v. *Glover*." In *Watson*'s Incumbent (*b*), is the following passage: — "Note, that neither plaintiff nor defendant may have judgment or execution, but a third person, that is no party to the suit; for, if, in the debate of a cause betwixt a plaintiff and defendant, it doth appear to the court, either by the declaration of

(*a*) *Sic* in the report in *Rolle*. (*b*) Page 288.

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the plaintiff, or by pleading, or confession of the parties, that neither of them hath right, but the presentation belongs to the King, the court may, nay, they ought to, award a writ to the bishop for the King, and without prayer on the part of the King; for, the court and judges are the King's counsel." Here, the plea merely adds to the facts stated in the declaration, that Dr. *Storie* held both the mother church and the district church as one church, being together of a greater yearly value than 1000*l.*, whereby the church of *St. Mary Magdalen* became vacant; and that, eighteen months having elapsed since the resignation by Dr. *Storie* of the church of *St. Giles*, and notice thereof, the right to present vested in the crown: so that, by reason of the prerogative of the crown, the plaintiff is not entitled to recover. It is, therefore, not like the case of a bishop setting up the title of a private individual. In *Apperley* v. *The Bishop of Hereford*, the bishop pleaded, not the title of the crown, but his own title to present by lapse. For these reasons, it is submitted that Mr. *Darvell* was not incumbent so as to prevent a lapse, that the title to present was in the crown, and that it was competent to the bishop to plead that.

Manning, Serjt., in reply. The distinction attempted to be set up between the present case and *Elvis* v. *The Archbishop of York*, on the ground that the crown is interested here, is not well founded: and, in truth, that *was* a case of title in the crown. The reason why the ordinary is not permitted to counterplead, is, that he is a stranger to the advowson. He cannot set up the *jus tertii:* and the rule applies with equal force in the case of the crown, as in the case of a subject. Besides, a mere allegation of title in the crown, is not enough to entitle the court to interfere in the way suggested. In the passage last cited from *Watson*, the

learned author adds: "But this must be when the King's title appears so clear *in allegatis et probatis* to the court, as that it is infallible both against plaintiff and defendant."

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court. (*a*)

We have considered this case, and we are of opinion that the declaration discloses a perfectly good title in the plaintiff to present, and that the pleas afford no answer. We consider the law to be well settled by the case of *Elvis* v. *The Archbishop of York,* confirmed by *Apperley* v. *The Bishop of Hereford, viz.* that it is not competent to the bishop to counterplead the patron's title.

With regard to the other objection, — that the incumbent, being in possession of the church of *St. Giles, Camberwell,* could not be admitted to the church of *St. Mary Magdalen, Peckham,* — it appears to be quite clear, according to the doctrine laid down by this court in *Apperley* v. *The Bishop of Hereford,* that, by the admission of Dr. *Storie* to the church of *St. Mary Magdalen* (the two livings being together worth more than 1000*l. per annum*), the incumbency of *St. Giles* became, *ipso facto,* void. We are, therefore, of opinion that there is no objection to the admission of the plaintiff's clerk on that ground, and that the pleas are unquestionably bad, and therefore the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(*a*) *Wilde,* C. J., *Maule,* J., *Cresswell,* J., and *Williams,* J.

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A ship, valued at 12,000*l.* was insured from *Valparaiso* to *England;* the freight, valued at 4000*l.*, was also insured by a separate policy: the ship, having sailed with a full cargo, consisting of 800 tons of merchandise, was compelled, by stress of weather, to put back to *Valparaiso,* where the master, finding, upon survey, that, to repair her so as to enable her to bring home the entire cargo, would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her: Held, not a total loss of either ship or freight.

ASSUMPSIT on two policies of assurance.

The first count was upon a policy, dated the 4th of *May,* 1844, for 1000*l.* upon the ship *Alfred,* valued at 12,000*l.*, at and from her port or ports of loading in the *Pacific,* not north of *Lima,* to her port or ports of discharge in the United Kingdom: Averment of a total loss, by perils of the sea.

The second count was upon a policy of the same date for 1000*l.* on chartered freight in the said ship *Alfred,* valued at 4000*l.*, at and from *Sidney, New South Wales,* to all or any port or ports in the *Pacific,* not north of *Lima,* to her port or ports of discharge in the United Kingdom: Averment, that the ship, by the perils and dangers of the sea, &c. became leaky and greatly damaged, and by the said perils and dangers the said ship became wholly lost to the plaintiffs, and never did arrive at her port of discharge; that the plaintiffs thereby lost the freight of the goods on board the said ship; and that thereupon the plaintiffs gave notice of the premises to the defendants, and then, according to the custom of merchants, abandoned and renounced all their interest in the premises to the defendants, — Notice of the premises, and demand of payment.

The declaration also contained the common counts.

The defendants pleaded, amongst other pleas, thirdly, as to so much of the first count as related to the defendants, not having paid or made good the partial loss

and damage, payment into court of 100*l.*, and no damages *ultrà*, — verification.

Fourthly, as to the residue of the causes of action in the first count, that the ship was not wholly lost; concluding to the country.

Seventhly, as to so much of the second count as related to the defendants' not having paid the partial loss by reason of the said ship, with the said goods on board, being lost, as attached to the said policy, payment into court of 150*l.*, and no damages *ultrà*, — verification.

Eighthly, as to the residue of the causes of action in the second count mentioned, that the said ship and the said freight were not wholly lost, &c.; concluding to the country.

The plaintiffs joined issue on the fourth and eighth pleas, and replied to the third and seventh, that the plaintiffs had sustained damages to a greater amount, on each policy, than the respective sums paid into court; whereupon issues were joined.

The cause was tried before *Wilde*, C. J., at the sittings in *London* after *Trinity* term, 1848.

The plaintiffs were mortgagees of the ship *Alfred*, of 716 tons. The defendants were three of the directors of the *Marine Insurance Company*. The policies were effected on the 4th of *May*, 1844, — the one upon the ship, valued at 12,000*l.*, the other upon freight, valued at 4000*l.* The *Alfred*, sailed from *London*, on the 8th of *September*, 1843, on a voyage to *Australia*, and thence to *South America*, whence she was chartered to bring home a cargo of guano or saltpetre, at a freight of 3*l.* 10*s.* *per* ton. She arrived, in the beginning of 1844, at a place called *Cobaya*, on the South American coast, and there, between the 22nd of *June* and the 4th of *July*, shipped on board a cargo consisting of 850 tons of guano. On the 2nd of *September*, she arrived at

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Valparaiso, where she took on board a quantity of dollars, on freight, and whalebone: and, on the 12th of *December*, she set sail for *England*. Between the 2nd and the 29th of *September*, she encountered a great deal of bad weather, and sustained considerable damage. On the 29th she put back, and she arrived at *Valparaiso* on the 19th of *October*.

On the 4th of *November*, the vessel, having been partially unloaded, was surveyed by certain officers of Her Majesty's ship *Daphne*, then at *Valparaiso*. They recommended certain repairs, which they thought would suffice to put the ship in a condition to bring home about 500 tons of her cargo.

Other surveys were had, on the 14th and 20th of *November*, by the port surveyor and other competent persons, who reported that it was necessary to take out all the cargo, and who estimated the repairs that would be necessary to enable the vessel to proceed to *England* with her entire cargo, at 11,711 dollars, and the expenses of unloading and reloading at 7608 dollars, making together 19,319 dollars, or 3710*l.* 5*s.*,—which would exceed the value of the freight, but would be less than the value of the ship when repaired. They further reported, that, seeing the difficulty of raising money at *Valparaiso*, and of obtaining the necessary workmen and materials to effect the repairs which they judged necessary, it would be for the interest of all concerned to sell the ship and to forward the cargo by other vessels. The ship was accordingly sold, by public auction, on the 10th of *April*, 1845, for 1734*l.*, and the cargo was ultimately delivered at *Liverpool*, by three other vessels, at a freight of 4*l.* 15*s.* and 5*l.* *per* ton.

The purchaser of the *Alfred* repaired her at an expense of about 240*l.* and sent her, with a cargo of about 600 tons, to *Hamburgh*, where she arrived on the 16th of *October*, 1845.

On the part of the plaintiffs, it was insisted,—first, that there was a constructive total loss of the ship,—secondly, that, supposing there was not a total loss of the ship, there was, at all events, a total loss of freight, to the extent, at least, of that portion of the cargo which the vessel was incompetent to carry home.

For the defendants, it was contended that there was no total loss of either ship or freight, and that enough had been paid into court to cover the average loss,—*viz.* 10 *per cent.* on the ship, and 15 *per cent.* on the freight. (*a*)

The lord chief justice told the jury, that, if, upon the evidence laid before them, they were satisfied that the vessel was damaged, by perils of the sea, to such an extent that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired, regard being had to the facilities for repair, and for raising money for that purpose, at *Valparaiso,* and the time which would be consumed therein, they must find for the plaintiffs, as for a total loss of the ship; and that, on the other hand, if they thought that the vessel, when properly repaired, would be worth more than the sum expended in such repairs, the plaintiffs would be entitled to recover for an average loss only. And, as to the second count, he told them, that, if they thought the vessel might have been repaired within a reasonable time, so as to be enabled to bring home *the whole* of the cargo, there had been no loss of any part of the freight: and that, if she might have been repaired so as to be able to bring home *a part* of the cargo only, the

(*a*) It was agreed that the sufficiency of the payment into court to cover an *average* loss, hould be referred to an arbitrator. And, before the rule came on for argument, the arbitrator decided that enough had been paid in.

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plaintiffs would be entitled to recover for a partial loss on freight.

The jury returned a verdict for the defendants.

S. Martin, in the following term — admitting that the summing up and the finding upon the first count could not be impeached, — obtained, as to the second count, a rule nisi for a new trial on the ground of misdirection, and that the verdict was against evidence. He contended that the proper question to be submitted to the jury upon the second count, was, whether, under the circumstances in which the vessel was placed at *Valparaiso*, a prudent owner, uninsured, would have incurred the expense necessary to enable her to bring home her entire cargo. He cited *Doyle* v. *Dallas* (*a*), and *Green* v. *The Royal Exchange Assurance Company*. (*b*)

Sir *John Jervis*, A. G. (with whom were *Channell*, Serjt., and *James Wilde*), on a former day in this term, shewed cause. He submitted, that, it being conceded that the direction of the lord chief justice, so far as it related to the first count, and the finding of the jury thereon, that there was no total loss of the ship, could not be impeached, there could be no pretence for saying, as to the second count, that there was a total loss of any part of the freight.

The court called upon

S. Martin, *Byles*, Serjt., and *Barstow*, to support the rule. The ship having sustained sea-damage, and having, in consequence, put back to *Valparaiso*, and being there found to be incompetent, save at an expense equal to, or exceeding, her value, to be repaired, so as to bring home the cargo she originally had on board, the

(*a*) 1 *M. & Rob.* 48.

(*b*) 6 *Taunt.* 68., 1 *Marsh.* 447.

jury ought to have been told that that amounted to a constructive total loss, at all events, of that part of the freight which the ship could not be rendered capable of earning. That part of the summing up which related to the first count, was undoubtedly correct, according to *Doyle* v. *Dallas* (*a*), and other cases. But the lord chief justice incorrectly applied to the freight, the same test as to repairs, which he had applied to the ship. The question is, whether a ship-owner, having no policy on the ship, but having effected an insurance on freight, and the ship sustaining sea-damage to an extent that would require an outlay to repair her, short of her value when repaired, may not say, that his ship has sustained damage to such an extent that no reasonable or prudent man would repair her at the place where she happens to be, for the purpose of earning the particular freight, and so treat the freight as totally lost. Assuming the ship to be worth 8000*l.*, and that the expense of repairing her so as to enable her to bring home her cargo would be 7000*l.*, there being a policy on freight for 2000*l.* — would the owner be bound to expend 7000*l.* in order to earn the 2000*l.*? Or, is he not at liberty to say that the freight is totally lost, because, by a peril insured against, he is called upon to incur an expense which no prudent owner uninsured would be justified in incurring? [*Cresswell*, J. Does the underwriter on freight undertake to pay, if the assured acts prudently in declining to earn freight?] Yes, provided he is prevented from earning it, by a peril insured against. [*Maule*, J. It must be assumed that a prudent owner would have repaired this ship.] The true test is, what a prudent owner would have done, if there had been no insurance on freight. In *Green* v. *The Royal Exchange Assurance Company*, it

(*a*) 1 *M. & Rob.* 48.

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was held, that, if, pending an insurance on freight, and a cargo shipped, the vessel becomes incapable of bringing the cargo home, the master is bound, or not bound, to repair her, and earn what he can on the homeward voyage, as a salvage for the underwriters on freight, according as a prudent owner, having regard to the state of his ship, but without reference to any insurance on the freight, would or would not pursue that course for his own advantage. [*Wilde*, C. J. You make the duty to repair depend upon the amount of the freight. What has the underwriter to do with that?] Is the owner bound to do more than an uninsured prudent owner, if he insures freight as well as ship? [*Maule*, J. The jury have found here that an uninsured prudent owner would have repaired the ship.] With reference to the ship only. [*Cresswell*, J. Is it competent to the ship-owner to say that he will not expend 600*l.* in the repair of the ship, for the purpose of earning 500*l.* freight, though the ship may be worth 10,000*l.*?] Is the owner of goods entitled to call upon the owner of the ship to carry them, if, to enable him so to do, he will have to expend a sum exceeding the amount of the freight? [*Wilde*, C. J. Yes. The test is, what a prudent owner would do; and that has always been, to repair when the repairs can be effected at an expense less than the value of the ship when repaired.] If the ship could not be repaired so as to bring home the cargo, except at an amount of expense exceeding the value of the freight, the assured may treat the freight as totally lost, although there may not have been a total loss of the ship.

Maule, J. This is an action upon two policies of assurance, the one upon ship, the other upon freight, from *Valparaiso* to *London*. A rule has been obtained for a new trial, on the grounds of misdirection and that

the verdict was against evidence. The verdict of the jury negatived a total loss of ship and freight, and also a total loss of part of the freight, — no distinction having been made between a total loss of part of the freight, and a partial loss of freight. The jury also, as I understand the verdict, negatived a total loss of part of the freight, other than a loss in respect of the charges incurred with reference to the freight; as to which there was a payment into court, the sufficiency of which was agreed to be referred to an arbitrator. The questions which were put to the jury, were, whether there was a total loss of the ship, and whether there was a total or a partial loss of the freight. The direction given by the lord chief justice to the jury, to enable them to arrive at a satisfactory conclusion, was given with reference to the evidence in the cause. The evidence was, that, in the course of the voyage, the ship had sustained damage, that she had been compelled to put back, that she underwent several surveys, and was ultimately sold, and repaired by the purchasers, and afterwards performed several voyages. The evidence does not seem to have raised any question whether the ship might not have been repaired, at an expense not extravagant. The highest estimate of the probable expense of repairing her so as to have made her capable of bringing home the whole cargo, was, 19,319 dollars: and she was in fact repaired at an expense of 1248 dollars, so as to be able to carry six hundred tons of cargo to *Hamburgh*, within three months of the time of sale. It seems difficult to understand how it could, under these circumstances, have been insisted before the jury, that there was a total loss of the *ship:* and it is not so contended now. It is said, however, that there was a misdirection with regard to the freight, inasmuch as the lord chief justice omitted to tell the jury, that, in determining whether or not there was a

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total loss of freight, they were to throw out of consideration the value of the ship, and to consider only whether or not a prudent owner, *acting with a view to the earning of freight*, would have executed the necessary repairs either wholly or in part. It is said, that, if, in a case like the present, a prudent owner, looking at the amount of freight, would not have executed the repairs so as to enable the ship to bring home the whole cargo, there would, at any rate, be a partial loss of freight, or a total loss of part, which would be the same thing; and that, if a prudent owner would not have executed any repairs, so as to enable the ship to bring home any part of the cargo, still, with reference only to the amount of freight, and without reference to the value of the ship, there would be a total loss of freight. The lord chief justice certainly did not put that proposition to the jury: and, if it was one which he ought to have put to them, the omission on his part so to do, undoubtedly amounts to a misdirection. But I do not agree that that is a correct view of the law upon the subject. The course which would be adopted by a prudent owner, with reference to the value of the ship, or the value of the freight, or with reference to many other considerations, is only introduced in this way: — Underwriters are responsible for losses arising from perils of the sea, — for such perils as are mentioned in the policy. If the ship is actually lost by a peril of the sea, or any other peril covered by the policy, the assured may call it a total loss. If she sustains damage to such an extent that she cannot be repaired at all, that also is a total loss. It may be that the injury sustained by the ship is irreparable with reference to the place where she is; for instance, the ship may have met with the disaster at a place where no workmen of requisite powers are to be met with, or where the necessary materials are not to be found, so that to

repair her there is altogether impracticable: and in such a case the loss would also be a total loss. But, short of that, it may be that it may be physically possible to repair the ship, but at an enormous cost: and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it. So, if a ship sustains such extensive damage, that it would not be reasonably practicable to repair her, — seeing that the expense of repairs would be such that no man of common sense would incur the outlay, — the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do, arises. However damaged the ship may be, if it be practicable to repair her, so as to enable her to complete the adventure, she is not totally lost. The ordinary measure of prudence which the courts have adopted, is this, — if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss. Now, in order to constitute a total loss of freight, — or, as far as that is in dispute in this case, a partial loss of freight, — the loss of freight must have arisen by reason of the total or partial incapacity of the ship to earn freight. I do not mean to say that there may not be a loss of ship or of freight, in the way which has been put in argument, but they do not arise here; nor is this a loss by charges, — which is a common partial loss on freight, — the underwriters having actually paid that. But the only loss in question here, is, a loss of freight as incident to the loss of the ship. If the ship was irreparably damaged, — considering the

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damage to be irreparable in the view I have mentioned, and which I take to be well established,—to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only as that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning. Both these views were submitted by the lord chief justice to the jury: he, in substance, told them, that, if they thought the ship could have been prudently and properly repaired, within a reasonable time, and at a reasonable cost, so as to be able to bring home the whole cargo, there had been no loss of any part of the freight; but that, if the ship could have been prudently repaired, so as to bring home a part of the cargo only, but not the whole, then the plaintiffs were entitled to recover as for a partial loss of freight. That seems to me to be perfectly correct. And I can find no authority, nor am I aware of any principle, to support the proposition which it has been insisted by the counsel for the plaintiffs the lord chief justice should have submitted to the jury. The shape which that proposition, as I understood it, ultimately took, was this, — that a ship sea-damaged might be in such a condition that a prudent owner, uninsured, would repair her, and yet there might be a total loss of freight. Thus, supposing a ship, considered with reference to her own value only, to be worth 10,000*l.*, and to be capable of being repaired, so as to be enabled to bring home the whole cargo, at a cost of 1000*l.*, that is still to be regarded as a total loss with reference to a policy on freight. That appears to me to involve a pure contradiction. The question is, whether the damage to the ship was reparable or irreparable; if the former, it was not a total loss; if the latter, it was.

The total or partial loss of freight must be incident to the loss of the ship. The difficulties which have been suggested in the course of the argument, seem to me to shew that the proposition thus contended for cannot be sustained. No authority has been cited which bears upon the question: and nothing has been urged to induce me to conclude that the direction given to the jury, was other than correct.

With respect to the verdict being against evidence, — the lord chief justice does not report that he is dissatisfied with the conclusion to which the jury came; and I am unable to say that it was wrong. It seems that the ship might have been repaired for a sum not exceeding 10 *per cent.* on her value. If so, unless some special reason be shewn to the contrary, the proper conclusion is obviously that at which the jury have arrived.

Cresswell, J. I am entirely of the same opinion. The motion is founded on the count upon the policy on freight; and I shall deal only with that: the other count is disposed of by the finding of the jury, which is not sought to be disturbed. The argument which has been addressed to us upon the subject of the loss of freight, has, as far as I am aware, the merit of being perfectly novel. I never heard of such a thing as a total loss of freight by perils of the sea, because the ship has sustained sea-damage to an amount exceeding the value of the freight. What is the nature of the contract between the ship-owner and the merchant whose goods he contracts to carry on freight? The ship-owner engages to carry the goods from the port of loading to the port of discharge: his contract would be absolute, but for the exception introduced into the bill of lading, — unless prevented by perils of the sea. Now, when is the ship-owner said to be prevented by

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perils of the sea from fulfilling the contract he has entered into? When the ship is, by a peril of the sea, rendered incapable of performing the voyage. A ship is not rendered incapable of performing the voyage when she is merely damaged to an extent which renders some repairs necessary: if that were so, any the most inconsiderable damage, such as the loss of her rudder, without which she could not proceed, would render her incapable of fulfilling the contract contained in the bill of lading. But, if a ship sustains so much sea-damage that she cannot be repaired, so as to be rendered competent to continue the adventure, then the owner is prevented by a peril of the sea from fulfilling his contract. If the ship is totally destroyed or sunk, the performance of the contract is obviously prevented by a peril of the sea. The courts of law have also engrafted this qualification upon the contract,—that, if the damage which results from a peril of the sea, is so great that it cannot be repaired at all, or only at a cost so ruinously large that no prudent owner would undertake the repairs, the owner may treat the loss as total, and say that he is prevented by a peril of the sea from performing his contract. Now, what is the contract of the underwriter? That the owner shall not be deprived of his freight by perils of the sea. The jury have in this case found that the ship might have been repaired at an expense such as a prudent owner, uninsured, would have incurred, regard being had to the value of the ship, and that the ship would have been enabled by that expenditure to earn the freight. The owner, then, has not been prevented from earning the freight by a peril of the sea, when, at an expense which it was reasonable for him to incur, he might have earned the freight. I therefore see no reason for disturbing the verdict, on the ground of any supposed misdirection; nor am I able to discover that the jury have come to an erroneous conclusion on the facts.

Williams, J. I entirely concur in the observations that have fallen from my brothers *Maule* and *Cresswell*, though, as I was necessarily absent during a portion of the argument, I abstain from expressing at any length the very strong opinion I entertain upon the main point which has been urged on the part of the plaintiffs. I have heard enough of the case, however, to make me feel satisfied that ample justice will be done between these parties, by discharging this rule, and that a contrary course would be fraught with injustice, and would be alike inconsistent with principle and authority.

Wilde, C. J. I agree with the rest of the court in thinking that there is no ground for disturbing this verdict. The points argued at nisi prius, were, whether the vessel in question had sustained damage by perils of the sea, and whether the damage so sustained, was so extensive that she could only have been repaired at a cost exceeding her value when repaired. This latter was, as I conceive, very properly negatived by the jury. The question we are now considering, arises upon the count on the policy on *freight:* and, in discussing this, I apprehend it is perfectly immaterial whether the *ship* was insured or not. I only advert to the first count, because the summing up was necessarily applicable to both. The jury found that the ship was not damaged to such an extent as to prevent her from earning the freight. The question is, did the jury properly so find, as regards the count on freight? The interest in the freight is by law considered incident to the ownership of the vessel. The cases of *Camden* v. *Anderson* (*a*) and *Morrison* v. *Parsons* (*b*) are distinct authorities for that: and, in this case, the only evidence of interest to maintain the action, was, the evidence of ownership.

(*a*) 5 *T. R.* 709., 6 *T. R.* 723., 1 *B. & P.* 272.

(*b*) 2 *Taunt.* 407.

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The question left to the jury being, whether the ship was damaged to such an extent as to prevent her from earning freight—the jury were told, that, if the cost of repairing the vessel, so as to enable her to earn the freight, would exceed her value when repaired, in that case she must be considered to be damaged to an extent to prevent her from earning freight. The jury found that she was not. The plaintiffs now complain that this is a misdirection; insisting, that the proper question to be left to the jury, was, not the extent of the damage, as compared with the value of the ship; but the cost of the repairs, as compared with the value of the freight. Did anybody ever before hear a suggestion that the question of loss or no loss was to be determined with reference, not to the extent of the damage sustained by the ship in relation to her value when repaired, but in relation to the amount of the freight? Can it be said, that, if a valuable ship has a small freight on board, and sustains sea-damage which is capable of being repaired at an expense not exceeding 10 *per cent.* on her value, the freight is to be said to be totally lost because the cost of repairing the ship exceeds the value of the freight? We are asked,—Would any man in his senses spend 1000*l.* upon the repairs of a ship for the mere purpose of earning 500*l.* freight? To this I answer, certainly not. But this is not the true question. If, by expending 1000*l.* upon the repairs, he gets, not only 500*l.* freight, but also a ship worth 3000*l.*, who will for a moment question the prudence of the outlay? Besides, the underwriter has nothing whatever to do with the amount of freight, when considering whether or not there has been a total loss by perils of the sea. The two questions are wholly distinct. The underwriter undertakes to indemnify the owner against a loss of freight by perils of the sea. The law has fixed the meaning of this warranty against sea-damage in such

distinct terms, that, for many years, every contract of insurance has been made with reference to the known and recognised principle, that a ship is prevented from performing her voyage, and consequently from earning freight, when she has sustained damage which can only be repaired at an expense which no prudent owner uninsured would incur; and that is when the outlay will exceed that which he will get by it, *viz.* when the ship, after the repairs are executed, will not be worth the sum which has been expended upon her. The ship is prevented from earning freight, when she is by a peril of the sea damaged to that extent. The amount of freight, therefore, forms no fair ingredient in the inquiry. The question was left to the jury in terms sufficiently explicit to avoid the possibility of doubt or mistake. They were told—You have before you the evidence on the part of the plaintiffs, of what would have been the cost of the repairs which would have been necessary to enable the ship to pursue the voyage; and you have the evidence, unopposed, of the defendants, as to what was the value of the ship; and, looking at the ship in the condition shewn by the plaintiffs' evidence, do you believe that she could have been repaired so as to earn this freight, at an expenditure less than her value,—in other words, at an expense which a prudent owner uninsured would incur? The jury say that she might. What possible ground is there to object to the way in which the case was put to the jury, unless it is to be said hereafter, that the underwriter's liability is to be subjected to a new test, *viz.* whether the ship has sustained damage, by a peril of the sea, to an extent equal to or exceeding the value, not of the ship, but of the freight? That is a test which has never yet been applied: it is one which is entirely unknown to the law, and is equally devoid of principle as it is of authority. The underwriter engages that

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the ship shall not by perils of the sea be disabled from performing the voyage: he does not consider whether she may meet with some accident which may entail upon her owner an expenditure exceeding the amount of freight,—which may be great or small, but of which he knows nothing. It seems to me that the conclusion the jury came to was correct. It is clear there was no total loss of the ship. The rule must, therefore, be discharged.

Rule discharged.

Frances Sterry, Executrix of Wasey Sterry, deceased, *v.* Clifton.

Jan. 16.

A., an attorney, holding the offices of clerk of the peace, clerk to the magistrates, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the deputy-lieutenants, steward of certain manors, coroner for a liberty, secretary to a conservative association, and secretary to a polling district association, — entered into articles of partnership with *B.*, by which, — after reciting that *A.* carried on the business of an attorney at &c., and held many offices, clerkships, and stewardships of manors, and that it had been agreed that *B.* should enter into partnership with *A.* "in the said business, and in the emoluments of the said offices, clerkships, and stewardships," upon the terms thereinafter expressed, — it was agreed that they should enter into partnership for twenty years, and that "all the profits and emoluments arising from the said offices, clerkships, and stewardships, held by *A.*, as also all such offices, clerkships, and stewardships as should be held by either of them the said *A.* and *B.* during the partnership, should be considered as partnership property, and be distributable accordingly:" and the articles contained this further provision — "that, if *A.* should die during the term, then, if, and during such period or periods as, it should happen that no son of *A.* should be a partner in the said business, *B.* should be interested in one moiety of *the said partnership business*, and the executors or administrators of *A.* should be entitled to the profits of the remaining moiety *thereof*, to be applied by them as part of his personal estate: —

Held, that the contract was not void, as being a contract for the sale of an office, either within the 5 & 6 *Ed.* 6. *c.* 16. or within the 49 *G.* 3. *c.* 126.

And that the latter clause was no violation of the 22 *G.* 2. *c.* 46. *s.* 11.

THE following case was, by order of Vice-Chancellor *Knight Bruce*, sent for the opinion of this court: — The plaintiff, *Frances Sterry*, is the widow and sole

executrix of *Wasey Sterry*, gentleman, deceased, who had, for many years previous to and at the time of the making and entering into the articles of partnership hereinafter set out, carried on the business of an attorney and solicitor, at *Romford*, in the county of *Essex*, and who, during that time, held many lucrative offices and appointments, that is to say, — clerk of the peace for the liberty of *Havering-atte-Bower*, in the county of *Essex*, — clerk to the commissioners of land and assessed-taxes for the same liberty, — clerk to the commissioners of sewers for the levels of *Havering*, — clerk to the magistrates for the half-hundred of *Beacontree* (*Ilford* division), in the same county, — clerk to the commissioners of land and assessed-taxes for the same half-hundred, — clerk to the deputy-lieutenants of the subdivision of *Ilford*, in the same county, — steward of the manors of *Barking*, *Cockermouth*, &c., in the same county, — coroner for the said liberty of *Havering-atte-Bower*, — secretary to the *Essex* conservative association, — and secretary to the *Romford* polling-district association.

In 1841, the said *Wasey Sterry* being willing to admit the defendant into partnership with him in his said business, a partnership was formed between them, upon the terms contained in the following articles of partnership, under seal, duly executed by both parties: —

Articles of partnership.

"Articles of agreement, made, on &c., between *Wasey Sterry*, of &c., and *William Henry Clifton*, of &c.: Whereas the said *Wasey Sterry* hath for many years carried on the business of an attorney and solicitor, and still carries on the same, at his offices at *Romford*, in the said county, &c.; and he holds many offices, clerkships, and stewardships of manors: And whereas it has been agreed between the said *Wasey Sterry* and the said *William Henry Clifton*, that he the

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said *William Henry Clifton* shall enter into partnership with the said *Wasey Sterry*, in the said business, and in the emoluments of the said offices, clerkships, and stewardships, upon the terms hereinafter expressed: Now, these presents witness, and it is hereby agreed and declared by and between the said *Wasey Sterry* and the said *William Henry Clifton*, that they shall enter into such partnership on the day of the date of these presents, under the firm or style of *Sterry & Clifton*, and that such partnership shall continue for twenty years from that time, subject to the provisions hereinafter contained; and, further, that all the profits and emoluments arising from the said offices, clerkships, and stewardships, held by the said *Wasey Sterry* as aforesaid, and also all such offices, clerkships, and stewardships as shall be held by either of them, the said *Wasey Sterry* and *William Henry Clifton*, during the said partnership, shall be considered as partnership property, and be distributed accordingly; and, further, that the said partnership shall be carried on at the present offices at *Romford;* and that, during the said partnership, the said *William Henry Clifton* shall reside at *Romford*, or within four miles thereof, and the said *Wasey Sterry* shall reside at *Upminster*, or within four miles of *Romford;* with liberty, nevertheless, for the said *Wasey Sterry* to be absent altogether from the said business and such residence, for any period or periods he may think necessary, in each year, but, in addition thereto, to take occasional holidays. [It was then provided that *Sterry* should have three fifths, and *Clifton* two fifths, of the partnership and profits; and that *Sterry*'s sons should be introduced as partners, upon certain terms. The articles then proceeded as follows:]—That, in the event of the retirement of *Wasey Sterry* from the partnership, and also in the event of the said *Wasey Sterry*'s death, and of all or

executrix of *Wasey Sterry*, gentleman, deceased, who had, for many years previous to and at the time of the making and entering into the articles of partnership hereinafter set out, carried on the business of an attorney and solicitor, at *Romford*, in the county of *Essex*, and who, during that time, held many lucrative offices and appointments, that is to say, — clerk of the peace for the liberty of *Havering-atte-Bower*, in the county of *Essex*, — clerk to the commissioners of land and assessed-taxes for the same liberty, — clerk to the commissioners of sewers for the levels of *Havering*, — clerk to the magistrates for the half-hundred of *Beacontree* (*Ilford* division), in the same county, — clerk to the commissioners of land and assessed-taxes for the same half-hundred, — clerk to the deputy-lieutenants of the subdivision of *Ilford*, in the same county, — steward of the manors of *Barking*, *Cockermouth*, &c., in the same county, — coroner for the said liberty of *Havering-atte-Bower*, — secretary to the *Essex* conservative association, — and secretary to the *Romford* polling-district association.

In 1841, the said *Wasey Sterry* being willing to admit the defendant into partnership with him in his said business, a partnership was formed between them, upon the terms contained in the following articles of partnership, under seal, duly executed by both parties: —

Articles of partnership.

"Articles of agreement, made, on &c., between *Wasey Sterry*, of &c., and *William Henry Clifton*, of &c.: Whereas the said *Wasey Sterry* hath for many years carried on the business of an attorney and solicitor, and still carries on the same, at his offices at *Romford*, in the said county, &c.; and he holds many offices, clerkships, and stewardships of manors: And whereas it has been agreed between the said *Wasey Sterry* and the said *William Henry Clifton*, that he the

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ing with the words "as part of his personal estate," is or is not void in law.

Peacock (with whom was *Channell*, Serjt.), for the plaintiff. There is no pretence for saying that the deed, or any portion of it, is void. When the parties were before Vice-Chancellor *Knight Bruce*, it was insisted, on the part of the defendant, that the clause referred to in the second question was rendered illegal by the 11th section of the 22 *G.* 2. *c.* 46 (*a*), its effect being that *Clifton* should allow his name to be used for the benefit of unqualified persons, *viz.* the executors or administrators of *Wasey Sterry*. The Vice-Chancellor intimated an opinion that the deed did not fall within

(*a*) That section recited that "whereas divers persons who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with, or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into, and act and practise in, the office and business of attorneys and solicitors, to the great prejudice and loss of many of His Majesty's subjects, and the scandal of the profession of the law," and enacted, "that, if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be any ways made use of *upon the account*, or *for the profit*, of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practise in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereof, upon oath, to the satisfaction of the court, that such sworn attorney or solicitor hath offended therein as aforesaid; then and in such case every such attorney or solicitor so offending shall be struck off the roll, and for ever after disabled from practising as an attorney or solicitor; and, in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person so acting or practising as aforesaid, to the prison of the said court, for any time not exceeding one year."

any of his sons being taken into partnership by the said *William Henry Clifton*, without having been appointed a partner or partners by the said *Wasey Sterry*, then, and in either of such cases, if and whilst two or more of the said sons shall be partners in the said business, the said *William Henry Clifton* shall continue to be interested in two fifth parts thereof; but, if and whilst one of the said sons only shall be a partner, the said *William Henry Clifton* and such one shall be interested in the said partnership business, in equal shares: and that, "*if the said Wasey Sterry shall die during the said partnership term of twenty years, then, if, and during such period or periods as, it shall happen that no son of the said Wasey Sterry shall be a partner in the said business, the said William Henry Clifton shall be interested in one moiety of the said partnership business, and the executors or administrators of the said Wasey Sterry shall be entitled to the profits of the remaining moiety thereof, to be applied by them as part of his personal estate.* In witness," &c.

From the day of the date of the above articles of partnership, up to and at the time of the death of the said *Wasey Sterry*, the said *Wasey Sterry* and the defendant continued in partnership together, on the above terms.

The said *Wasey Sterry* died on the 15th of *July*, 1842, having previously duly made and published his last will and testament in writing, and thereby appointed the plaintiff, *Frances Sterry*, sole executrix thereof, who afterwards duly proved the same.

The questions for the opinion of the court are,—first, whether the said articles of partnership are or are not void in law,—secondly, if not, whether the particular clause or provision in such articles, beginning with the words "If the said *Wasey Sterry* shall die during the partnership term of twenty years," and end-

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attorney himself during a certain period, for the mixed consideration of the goodwill of the business, the advance of money, and family affection, and is neither within the mischief nor the words of the statute. In the case of *Tench* v. *Roberts*, which was before me, on demurrer, on the 18th of *May*, 1819, the plaintiff, who was not an attorney, but described himself as a writer, entered into an agreement with the defendant, who was an attorney, to become an assistant to him in his business, on condition that he received one third of the profits, in lieu of salary, but not to be considered as a partner: I held, that, in point of law, this was a partnership, and that, by the necessary effect of this agreement, *Tench*, an unqualified person, was enabled to act or practise as an attorney, and to use the name of *Roberts* upon his account, and for his profit." In *Bunn* v. *Guy* (*a*), a contract entered into by a practising attorney, to relinquish his business, and recommend his clients to two other attorneys, for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them to make use of his name in their firm for a certain time, but without his interference, &c., was held to be valid in law. The notaries' act, 41 *G.* 3. *c.* 79. *s.* 10. (*b*),

(*a*) 4 *East*, 190.

(*b*) Which enacts "that, if any public notary shall *act* as such, or *permit* or suffer *his name to be* in any manner *used*, for or on account, or for the profit and benefit, of any person or persons not entitled to act as a public notary, and complaint shall be made in a summary way to the court of faculties wherein he hath been admitted and inrolled, upon oath, to the satisfaction of the said court, that such notary hath offended therein as aforesaid, then, and in such case, every such notary so offending shall be struck off the roll of faculties, and be for ever after disabled from practising as a public notary, or doing any notarial act, — save and except as to any allowance or allowances, sum or sums of money, that are or shall be agreed to be made or paid to the widows or children of any deceased public notary or notaries, by any surviving partner or partners of such deceased notary or notaries."

makes express provision for allowances to widows and children of deceased partners (*a*); this was necessary, the language of the two acts being essentially different. *Jackson and Wood in re* (*b*), and *Williams* v. *Jones* (*c*), which were cited in equity, are distinguishable upon the same ground as *Tench* v. *Roberts, viz.* that, in both, the agreement was that the attorney's name should be used for the profit of an unqualified person.

Willes (with whom were *Cowling* and *Joliffe*), for the defendant. The articles of partnership in this case are illegal and void, upon two grounds,—first, that they relate to an illegal sale of an office within the 5 & 6 *Ed.* 6. *c.* 16. *ss.* 2, 3. and the 49 *G.* 3. *c.* 126. *ss.* 1. 3., —secondly, that the last clause is in express contravention of the statute 22 *G.* 2. *c.* 46. *s.* 11.

1. By the first of these statutes, it is,—"for the avoiding of corruption which may hereafter happen to be in the officers and ministers in those courts, places, or rooms, wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced to the place where justice is to be ministered, or any service of trust executed, should hereafter be preferred to the same, and no other,"—enacted, "that, if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or for the deputa-

(*a*) See Lord *Eldon's* remarks upon this provision, *Jacob*, 232.

(*b*) 1 *B.* & *C.* 270. And see 2 *Stark. N. P. C.* 443

(*c*) 5 *B.* & *C.* 108., 7 *D.* & *R.* 548.

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tion of any office or offices, or any part of them, or to the intent that any person should have, exercise, or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them, *which office or offices, or any part or parcel of them, shall in any wise touch or concern the administration or execution of justice,* or the receipt, controlment, or payment of any of the King's Highness's treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of any of the King's Majesty's honors, castles, manors, lands, tenements, woods, or hereditaments, or any of the King's Majesty's customs, or any other administration or necessary attendance to be had, done, or executed, in any of the King's Majesty's custom-house or houses, or the keeping of any of the King's Majesty's towns, castles, or fortresses, being used, occupied, or appointed for a place of strength and defence, *or which shall concern or touch any clerkship to be occupied in any manner of court of record wherein justice is to be ministered,*—that then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations, or that shall take any money, fee, reward, or profit for any of the said office or offices, deputation or deputations of any of the said offices, or any part of any of them, or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit, to be given for any of the said office or offices, deputation or deputations of any of the said office or offices, or any part of any of them, shall not only lose and forfeit all his and their right, interest, and estate which such person or persons shall then have, of, in, or to any of the said office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any of the said office or offices, deputation or deputations, for the which office or offices, or for the deputation or deputations of which office or

offices, or for any part of any of them, any such person or persons shall so make any bargain or sale, or take or receive any sum of money, fee, reward, or profit, or any promise, covenant, or assurance to have or receive any fee, reward, money, or profit; but also that all and every such person or persons that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond, or assurance for any of the said offices, or for the deputation or deputations of any of the said office or offices, or any part of any of them, shall, immediately by and upon the same fee, money, or reward given or paid, or upon any such promise, covenant, bond, or agreement had or made for any fee, sum of money, or reward to be paid as is aforesaid, be adjudged a disabled person in law, to all intents and purposes, to have, occupy, or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee, or reward, or make any promise, covenant, bond, or other assurance to give or pay any sum of money, fee, or reward." The 1st section of the 49 *G.* 3. *c.* 126. extends the provisions of the former act to "all offices in the gift of the crown, or of any office appointed by the crown, and all commissions, civil, naval, or military, and to all places and employments, and to all deputations to any such offices, or commissions, places, or employments in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master-general and principal officers of His Majesty's ordnance, the commander in chief, the secretary at war, the paymaster-general of His Majesty's forces, the commissioners for the affairs of *India*, the commissioners of the excise, the treasurer of the navy,

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the commissioners of the navy, the commissioners for victualling, the commissioners of transports, the commissary-general, the storekeeper-general, and also the principal officers of any other public department or office of His Majesty's government in any part of the United Kingdom, or in any of His Majesty's dominions, colonies, or plantations which now belong or may hereafter belong to His Majesty; and also to all offices, commissions, places, and employments belonging to, or under the appointment or control of the united company of merchants of *England* trading to the *East Indies.*" And the 3rd section enacts, "that, if any person or persons shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance, or shall, by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, and also if any person or persons shall purchase, or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward, or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward, or profit, or shall, by any way, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place, or employment specified or described in the said recited act or this act, or within the true intent or meaning of the said act, or this act, or for any deputation thereto, or for any part, parcel, *or participation of the profits thereof*, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons to any such appointment, nomination,

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or resignation,—then and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor." The articles of partnership in this case recite that *Sterry* carried on the business of an attorney, and held many offices, clerkships, and stewardships of manors, and that it had been agreed between him and *Clifton* that the latter should enter into partnership with him in the said business, and in the emoluments of the said offices, clerkships, and stewardships; and the case enumerates the offices and stewardships to which the agreement has reference. If any one of the offices so enumerated be within the statutes, the agreement is one which cannot be carried into effect. Now, the office of clerk of the peace, of clerk to the commissioners of land and assessed-taxes, of clerk to the commissioners of sewers, and of clerk to the magistrates, are all offices which "touch or concern the administration or execution of justice." In *Hopkins* v. *Prescott* (*a*), an agreement whereby,—after reciting that *A.* had carried on the business of a law-stationer at *G.*, *and also had been sub-distributor of stamps, collector of assessed-taxes*, &c., there, and that he had agreed with *B.* for the sale of the said business, and of all his goodwill and interest therein, to him, for the sum of 300*l.*,—*A.*, in consideration of the said sum of 300*l.*, agreed to sell, and *B.* agreed to purchase, the said business of a law-stationer at *G.*, and whereby it was further agreed that *A.* should not at any time after the 1st of *March* then next, carry on the business of a law-stationer at *G.*, or within ten miles thereof, *or collect any of the assessed-taxes*, &c., but would use his utmost endeavours to introduce *B.* to the said business and offices;—was

(*a*) *Antè*, Vol. IV. p. 578.

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held to be illegal and void, as being a contract for the sale of an office, within the 5 & 6 *Ed.* 6. *c.* 16., and also within the 49 *G.* 3. *c.* 126. *Wilde*, C. J. there says: "The subject-matter of the agreement, in addition to the sale of the business of a law-stationer, is, that the plaintiff will, for certain reward, resign the offices of collector of assessed-taxes and sub-distributor of stamps, and use his best endeavours to procure the defendant to be appointed to those offices. The question is, whether these are offices within the statute 5 & 6 *Ed.* 6. *c.* 16. It is said that the court cannot take notice of the office of 'collector of assessed-taxes.' He is, however, an officer appointed, under certain acts of parliament, of which we must take notice, to an office connected with the receipt of the revenue. The office of sub-distributor of stamps, likewise, is an office of the same description. Both are within the 5 & 6 *Ed.* 6. *c.* 16., the 3rd section of which avoids all contracts for the sale or purchase of the several offices mentioned in the 2nd section. We need not, therefore, look beyond the provisions of that statute, to see that the contract declared on in this case cannot be made the foundation of an action. The 49 *G.* 3. *c.* 126. *s.* 3., however, carries the matter still further, by making the transactions prohibited by the statute of *Edward*, misdemeanors. The effect of both statutes, is, that this agreement is utterly void." [*Williams*, J. The statute 5 & 6 *Ed.* 6. *c.* 16. contemplates that the person who pays the money is to enjoy the office, or part of it.] Dr. *Trevor*'s case (*a*) shews that a large and liberal construction is to be given to the statute, to suppress the mischief which it was designed to remedy. In *Palmer* v. *Bate* (*b*), the office of clerk of the peace was held to

(*a*) 12 *Co. Rep.* 78. (*a.*)

(*b*) 2 *B.* & *B.* 673., 6 *J. B. Moore*, 28.

be within the statute 5 & 6 *Ed.* 6. *c.* 16. The office of clerk to the commissioners of sewers,—who are a court of record (*a*),—is equally within the statute. So also is that of clerk to the magistrates: it is clearly an office connected with the administration of justice; its nature is discussed in *Ex parte Sandys* (*b*); and it is an office that is recognised in the statutes 26 *G.* 3. *c.* 14., 6 *G.* 4. *c.* 50. *s.* 10., and 9 *G.* 4. *c.* 61. *s.* 15. The office of coroner is within the provisions of the statute 5 & 6 *Ed.* 6. *c.* 16. (*c*) So also is that of clerk to the land and assessed-tax commissioners, the duties of whose office are regulated by the 43 *G.* 3. *c.* 99. *s.* 9., and 3 *G.* 4. *c.* 88. *s.* 6. And *Hopkins* v. *Prescott* shews that it is immaterial that the office was unknown at the time of the passing of the statute of 5 & 6 *Ed.* 6. *c.* 16. The office of clerk to the deputy-lieutenants of the subdivision of *Ilford*, is probably a military, rather than a judicial office, and may not be within the statute of *Edward*; though it might still be within the 49 *G.* 3. *c.* 126. [*Maule*, J. It is not necessary to give effect to all the words in the deed: some of the offices that are mentioned clearly are not within the statute; stewardships of manors, for instance.] The agreement evidently contemplates the assignment of the profits of *all* the offices mentioned in the case; and, if *any one of them* cannot legally be assigned, the contract is altogether void. It is difficult to say that the stewardship of a manor,—which is an office partly ministerial and partly judicial (*d*),—is not within the statute. [*Maule*, J. Have you any express authority for that?] In *Williamson* v. *Barnsley* (*e*), the

(*a*) See *Fitz. Nat. Brev.* 113.; *Com. Dig. Justices* (G. 3.); *Callis on Sewers*, 163—167.; 4 *Wentw. Pl.* 191.; *Ramsey* v. *Nornabel*, 11 *Ad. & E.* 383.

(*b*) 4 *B. & Ad.* 863.

(*c*) See *Hawk. P.C.* ch. 9. §. 1.

(*d*) See 1 *Scriven on Copyholds*, 4th edit. p. 116.; *The Queen* v. *The Lord of the Manor of Old Hall*, 10 *Ad. & E.* 248.

(*e*) 1 *Brownl. & G.* 70.

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office of steward of a court-leet or court-baron was held to be within the statute. In *Godolphin* v. *Tudor* (*a*), it was held, that, if a person hold an *auditor's* office for life, and depute another to exercise the said office during his good behaviour, a bond given by such deputy to pay his principal yearly, during the said deputation, 200*l.*, and that, in consideration thereof, the deputy shall have all the rents and profits of the said office to his own use, is void by the statute 5 & 6 *Ed.* 6. *c.* 16., for, it is a bond to pay a certain sum at all events. This is not a mere case of giving a portion of the profits of an office to a deputy. [*Cresswell*, J. Do you contend that this would have been a void bargain within the statute of *Edward*, independently of the 49 *G.* 3. *c.* 126.?] It is submitted that it does come within the statute of *Edward:* but, at all events, it is within the 3rd section of the 49 *G.* 3. *c.* 126. The cases of *Flarty* v. *Odlum* (*b*) and *Wells* v. *Porter* (*c*), shew the extreme jealousy of the common law upon the subject of assignments of offices or profits of offices: and the statute 5 & 6 *Ed.* 6. *c.* 16. must be taken to enact what was the common law before, with an additional penalty. It may be said that there is nothing in these articles of partnership to entitle *Clifton* to a portion of the profits of any offices held by *Sterry*, the sale of which would be illegal. But general words are used, which, if found in a will, would suffice to pass all the party had. Would one or two offices satisfy the words "many offices?"

2. Upon the other question,—whether the agreement in this case comes within the 22 *G.* 2. *c.* 46. *s.* 11., —the court will have to elect between the opinions of

(*a*) 6 *Mod.* 234., 2 *Salk.* 468., *Willes*, 375 (*f*); affirmed in the House of Lords, 1 *Bro. P. C.* 101. (135).

(*b*) 3 *T. R.* 681.

(*c*) 8 *M. & W.* 149. And see *Barwick* v. *Reade*, 1 *H. Bla.* 627., *Gibson* v. *The East India Company*, 5 *N.C.* 262., 7 *Scott*, 74.

Lord *Eldon* and Sir *John Leach* in *Candler* v. *Candler* (*a*), and that of Lord *Tenterden*, in *Jackson, in re.* (*b*) In the former case, however, it is to be observed, there was no ultimate judgment; the matter appears to have been compromised. In *Jackson, in re*, an attorney had engaged a certificated conveyancer to conduct his business, and agreed to allow him a moiety of the profits, instead of a salary: and *Abbott*, C. J., said: "I am clearly of opinion that this is a case both within the spirit and the words of the statute. The enacting part must be construed with reference to the mischief recited in the preamble. That mischief was, that persons not admitted as attorneys, did, by the connivance of attorneys, intrude themselves into, and act and practise in, the office and business of attorneys. Now, here, *Wood*, who is not an admitted attorney, was enabled, by the connivance of *Jackson*, to intrude himself into, and act and practise in, the office and business of an attorney. This is a case clearly, therefore, within the mischief which it was the object of the statute to remedy. The statute then proceeds to enact, 'that, if any sworn attorney shall act as agent for any person not duly qualified to act as an attorney, or permit his name to be in any wise made use of, for the account or profit of any unqualified person, or send any process to such unqualified person, thereby to enable him to appear, act, or practise in any respect as an attorney, the attorney so offending shall be struck off the roll, and for ever after disabled from practice.' Now, here, *Jackson* permitted his name to be made use of upon the account and for the profit of *Wood*. It is, therefore, a case within the words of the enacting part of the clause. It has been urged, that, to bring the case within the act,

(*a*) *Jacob*, 225., 6 *Madd.* 141. (*b*) 1 *B. & C.* 270.

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it must have been done for the purpose of enabling an unqualified person to act as an attorney. I am of opinion the word *thereby* applies merely to the sending of process to the unqualified person, and not to the whole of the preceding sentence." [*Williams*, J. The decision there proceeded upon the ground that the case fell within the mischief recited in the preamble to the 11th section.] Where the enacting part of a statute is clear, it is not to be controlled by the words of the preamble. This is clearly laid down by *Pollock*, C. B., in delivering the judgment of the court of Exchequer, in *Salkeld* v. *Johnson* (*a*): "Although," he says "the title has occasionally been referred to as aiding in the construction of an act (particularly by Sir *John Nicholl*, in *Brett* v. *Brett* (*b*)), it is certainly no part of the law, and, in strictness, ought not to be taken into consideration at all: Lord *Coke*, *Powlter*'s case (*c*); Lord *Holt*, *Wells* and *Wilkins* (*d*); Lord *Mansfield*, *Rex* v. *Williams* (*e*); and Lord *Hardwicke*, *The Attorney-General* v. *Lord Weymouth*. (*g*) But the preamble is undoubtedly a part of the act, and may be used to explain it, and is, as Lord *Coke* says (*h*), 'a key to open the meaning of the makers of the act, and the mischiefs it was intended to remedy;' but, on the other hand, although it may explain, it cannot control the enacting part, which may, and often does, go beyond the preamble." [*Williams*, J. The clear words of the enacting part certainly are not to be controlled by the language of the preamble.]

Peacock, in reply. This is not a contract for the sale of an office, or of part of an office, within the meaning of the statutes. [*Maule*, J. I doubt whether

(*a*) 2 *Exch.* 282, 283.
(*b*) 3 *Addams*, 210.
(*c*) 11 *Co. Rep.* 33.
(*d*) 6 *Mod.* 62.
(*e*) 1 *W. Bla.* 95.
(*g*) *Ambler*, 22.
(*h*) 4 *Inst.* 330.

the case ought not to have stated, as a fact, that the parties contracted with reference to all the offices referred to, or some of them. Upon the case as it stands, the question is, whether there is evidence from which we can infer that they did intend to include these offices.] The obvious meaning of the contract is, that *Sterry* conveys to *Clifton, so far as it may be legal so to do*, an interest in the offices or appointments which he held. In *Harrington* v. *Kloprogge* (*a*), it was held that an assignment of the profits of all offices which the defendant might acquire, is legal; as it will be taken to mean, of all offices which may be legally assigned. Assuming that the agreement in this case affects to deal with the office of clerk of the peace, and that that is an office within the statute, still, it is submitted, the contract is not illegal. There is no portion of the fees of that or of any of the other offices, that *Sterry* has agreed to assign to *Clifton*. In *Aston* v. *Gwinnell* (*b*),—where it was held that the office of clerk to the deputy registrar in the prerogative court of *Canterbury*, is not an office connected with the administration of justice, within the meaning of the statute 5 & 6 *Ed.* 6. *c.* 16., so as to prevent its being aliened or charged; nor is an alienation of or charge on the profits of the office, contrary to the policy of the law restricting the alienation of the income of a public officer,—Lord Chief Baron *Alexander* makes a distinction between the sale of an office, and an assignment of the profits. "It is then objected," he says (*c*), "to the part of the prayer respecting the profits of the office, that the contract is void by the statute of 5 & 6 *Ed.* 6. *c.* 16. I am not able to perceive the bearing of this act upon the present question. The object of that law was, to prohibit corrupt contracts, by which a right to an office, or a right

(*a*) 4 *Dougl.* 5., 2 *Chitt. R.* 475., 2 *Brod. & B.* 678 (*a*)., 6 *J. B. Moore*, 38 (*a*).

(*b*) 3 *Y. & J.* 136.

(*c*) *Ib.* 148.

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to exercise any of its duties, might be obtained, with a view that persons worthy of such trusts might be advanced to them. This contract seems to me to have no relation to that subject. Forgetting, for the moment, that this is a mere clerkship held during the pleasure of the chief officer, I cannot avoid recollecting that the appointment, or any influence used or to be used for the purpose of obtaining it, is quite remote from this transaction. I cannot, therefore, apply any argument drawn from that statute, to the point now under my consideration. Another class of cases has been, with more plausibility, applied to this controversy. I allude to that class which is founded on principles of state policy, and which protects the servants of the public from their own improvidence, and secures to them, in defiance of their own acts, the possession of those resources derived from the public, and intended to enable them to perform their public functions. The pay of naval and military officers, and their incapacity to assign it either at law or in equity, after some hesitation, at last established, affords the most distinct and intelligible instance of the application of this rule. The office, or rather the profits of the office, of clerk of the peace, seems another instance of the same character. But I am not able to apply that principle to the situation of the defendant *Askew*. His situation is called an office; but its nature is not very distinctly explained. This, however, is represented, that he is a mere clerk, assisting the deputy-registrars, receiving emolument for business done, at the pleasure of his superiors. It does not appear to me that he can be considered as an officer of the court. And, as to his connection with the actual execution of any function in the prerogative court, there is none. It is confined to receiving, during the pleasure of his superiors, certain sums earned by the labours of another person permitted actually to perform

there these functions." *Layng* v. *Paine* (*a*) was the case of an actual sale of an office. In *Gulliford* v. *De Cardonell* (*b*), and in *Godolphin* v. *Tudor*, a bond given by a deputy to the principal, to pay him half the profits, or a certain sum out of the salary or profits, of the office, was held good. *Hopkins* v. *Prescott* was the case of an agreement that was clearly illegal, within the rule laid down in *Co. Litt.* 234. a., and 3 *Inst.* 154. The deed now in question, was not intended to operate, nor did it operate, as an assignment of the offices, or any part of them. Even, therefore, supposing the court should incline to hold the deed to be illegal if intended to convey part of the profits of any offices which the parties could not legally deal with, will they, without any evidence upon the subject, assume that the parties did so intend? In *Co. Litt.* 42. a., it is said: "A tenant in fee-simple makes a lease of lands to *B.*, to have and to hold to *B.* for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee; for, it shall be taken most strongly against the lessor; and, as hath been said, an estate for a man's own life is higher than for the life of another. But, if tenant in tail make such a lease, without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons,—first, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and, in this case, if, by construction, it should be for the life of the lessee, then should the estate-tail be discontinued, and a new reversion gained by wrong; but, if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that, whensoever the words of a deed, or of the parties with-

(*a*) *Willes*, 571.; *antè*, Vol. IV. p. 587. (*b*) 2 *Salk.* 466.

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out deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law, shall be taken," &c. In *Bacon's* Maxims (*a*), it is said: "It is a rule that Kings' grants shall not be taken or construed to a special intent: it is not so with the grants of a common person, for, they shall be extended as well to a foreign intent as to a common intent; yet with this exception, that they shall never be taken to an impertinent or repugnant intent: for, all words, whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter or person." Here, notwithstanding the general words of the recital, the operation of the deed must be limited to those offices the profits of which could be legally dealt with. There is no authority for saying that the office of clerk to the magistrates, clerk to assessed-tax commissioners, or clerk to commissioners of sewers, is an office touching or concerning the administration of justice, any more than that of clerk to a judge of one of the superior courts. The stewardship of a court-leet was held, in *Williamson* v. *Barnsley*, to be an office within the 5 & 6 *Ed.* 6. *c.* 16.; but there are many manors that have no courts-leet. The duties of the steward of a manor are in no respect judicial: *Com. Dig. Copyhold* (R. 5.), (R. 6.). [*Wilde*, C. J. A court-baron is incident to every manor: *Co. Litt.* 58. And the steward presiding in a court-baron has been held to be a judicial officer: *Holroyd* v. *Breare* (*b*); *Bradley* v. *Carr* (*c*); *Brown* v. *Gill.* (*d*)]

As to the last clause, the construction put by Sir *John Leach* and by Lord *Eldon* upon the statute 22 *G.* 2. *c.* 46. *s.* 11. in *Candler* v. *Candler*, is clearly the correct one, *viz.* that the meaning of the clause, is, that

(*a*) *Reg.* 10. *Verba generalia restringuntur ad habilitatem rei vel personæ.*

(*b*) 2 *B. & Ald.* 473.

(*c*) 3 *M. & G.* 221., 3 *Scott, N. R.* 521. *A fortiori*, when holding a *customary* court.

(*d*) *Antè*, Vol. II. p. 861.

qualified persons should not permit their names to be used by others, so as to enable them to appear as attorneys. The true rule for the construction of acts of parliament, is that given by *Tindal*, C. J., in *The Sussex Peerage* case (*a*), "The only rule for the construction of acts of parliament, is, that they should be construed according to the intent of the parliament which passed the act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law-giver. But, if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice *Dyer* (*b*), is a 'key to open the minds of the makers of the act, and the mischiefs which they intended to redress.'" The intention of the framers of this act, it is submitted, will be best carried into effect in this case, by holding that the clause in question was not illegal.

Cur. adv. vult.

The following certificate was afterwards sent to the Vice-Chancellor: —

"This case has been argued before us by counsel; we have considered it, and are of opinion that the articles of partnership set forth, are not void in law.

"Secondly, we are of opinion that the particular clause therein mentioned, is not void in law.

"THOS. WILDE.
"W. H. MAULE.
"C. CRESSWELL.
"E. V. WILLIAMS."

(*a*) 11 *Clark & Fin.* 143. (*b*) *Stowel* v. *Lord Zouch, Plowden*, 369.

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DOOGOOD *v.* ROSE.

Jan. 16.

The declaration stated that it was agreed between *A.* (the plaintiff) and *B.* (the defendant), that *A.*, *B.*, and *C.* should, at the expiration of a reasonable time, execute an indenture binding *C.* as an apprentice to *A.*, and that *B.* should pay to *A.* a premium of 60*l.*,—5*l.* on the execution of the indenture, and the residue by certain bills, to be drawn by the plaintiff and accepted by the defendant: averment, that, although a reasonable time for *B.* and *C.* to execute the indenture, and for *B.* to pay the 5*l.*, and to accept the bills, had elapsed, and although *A.* had always been ready and willing to execute such indenture, and to receive *C.* as such apprentice, and although *A.*, at the expiration of such reasonable time, requested *B.* to execute such indenture, and to pay the 5*l.* and accept and deliver to him the said bills, yet *B.* did not nor would execute the indenture, or pay the 5*l.*, or accept, and deliver to *A.*, the said bills, but wholly refused so to do, *and then wholly exonerated and discharged A. from tendering such indenture for execution, and such bills for acceptance*, &c.

Plea, — that *B.* did not exonerate and discharge *A.* from tendering the indenture to him for execution, or the bills for acceptance.

The issue having been found for the defendant: — Held, upon motion for judgment *non obstante veredicto*, that the declaration would have been clearly bad without the averment of dispensation; and therefore that the issue taken thereon was not an immaterial one, — though, by reason of the want of an averment that *B.* had *notice* of *A.*'s readiness and willingness to execute the indenture, the declaration would be insufficient to support a judgment for the plaintiff.

A repleader can only be awarded where the court cannot, upon the matter alleged upon, and established by, the record, see which way the judgment ought to be given: and it is never awarded in favour of the party who makes the first default.

THIS was an action of assumpsit. The first count of the declaration stated, that the plaintiff, before and at the time of the making of the agreement and promise of the defendant thereinafter next mentioned, was, and ever since had been, and still was, a short-hand writer and reporter, and, for and during all the time aforesaid, had used, exercised, and carried on, and still did use, exercise, and carry on the profession or business of a short-hand writer and reporter; that, the plaintiff being such short-hand writer and reporter as aforesaid, theretofore, to wit, on the 1st of *May*, 1848, it was agreed by and between the plaintiff and the defendant, that the plaintiff and the defendant, and one

John Rose, the son of the defendant, should, at the expiration of a reasonable time then next following, make and execute, and as their act and deed deliver, a usual and reasonable indenture of apprenticeship, for the purpose of apprenticing, and binding as an apprentice, the said *John Rose* to the plaintiff in the way of his the plaintiff's said profession or business, and that the defendant should pay to the plaintiff, as and by way of premium or apprentice-fee for taking and receiving the said *John Rose* as such apprentice as aforesaid, the sum of 60*l.*, to be paid in the manner following, that is to say, 5*l.*, part thereof, to be paid to the plaintiff at the time of the execution of the said indenture of apprenticeship, and the residue of the said sum of 60*l.* to be then secured to the plaintiff by certain bills of exchange in writing, for the amount of the said residue, to be then drawn by the plaintiff upon, and accepted by, the defendant, and delivered to the plaintiff, that is to say, three several bills for the respective amounts of 20*l.*, 20*l.*, and 15*l.*, and payable at the respective times of three months, six months, and nine months from the date thereof: Mutual promises: Averment, that, although a reasonable time from the making of the said agreement and promise of the defendant, for him, the defendant, and the said *John Rose*, to make and execute, and, as their respective acts and deeds, deliver such indenture of apprenticeship as aforesaid, for the purpose aforesaid, and for him the defendant to pay to the plaintiff the said sum of 5*l.*, and to accept and deliver to the plaintiff such bills of exchange as aforesaid, had elapsed before the commencement of this suit; and although the plaintiff had always from the time of the making of the said agreement and promise, and during such reasonable time as last aforesaid, and at the expiration thereof, and at all other times, been ready and willing to make and execute, and as his act and deed

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deliver, such usual and reasonable indenture of apprenticeship as aforesaid, and to receive and take the said *John Rose* as such apprentice as aforesaid, and to perform and fulfil the said agreement in all things on his part to be performed and fulfilled; and although the plaintiff, afterwards, and at the expiration of such reasonable time as aforesaid, and before the commencement of this suit, to wit, on the 20th of *November*, in the year aforesaid, requested the defendant to make and execute, and as his act and deed deliver, such indenture as aforesaid, and to pay to him the said sum of *5l.*, and to accept and deliver to him the plaintiff such bills of exchange as aforesaid, according to his said promise and agreement in that behalf;—yet that the defendant, not regarding his said promise, did not nor would, when he was so requested as aforesaid, or at any other time, make or execute, or as his act and deed deliver, such usual and reasonable indenture of apprenticeship as aforesaid, or pay the said sum of *5l.*, or accept and deliver to the plaintiff such bills of exchange as aforesaid, or at any other time, but wholly refused so to do, and wholly exonerated, and then, to wit, on the day and year last aforesaid, *discharged the plaintiff from tendering such usual and reasonable indenture of apprenticeship as aforesaid to the defendant for execution, and such bills of exchange as aforesaid, for his acceptance thereof, and dispensed with the same;* and that, at the time of the commencement of this suit, no such indenture as aforesaid was delivered by the defendant, and the said sum of *5l.* then remained and was, and still continued, unpaid to the plaintiff, and the said bills remained, and still were, wholly unaccepted by the defendant; and that, by means of the said several premises, the plaintiff had not only lost and been deprived of the said sum of *5l.*, and the use of such bills of exchange as aforesaid, but also thereby the plaintiff was put to great expenses of

his moneys, to wit, to the amount of 20*l.*, in and about the preparing such indenture as aforesaid, and otherwise arranging to perform his said contract.

To this count, the defendant pleaded, that he, the defendant, did not exonerate or discharge the plaintiff from tendering such usual or reasonable indenture of apprenticeship, as in the said first count aforesaid, to him, the defendant, for execution, or such bills of exchange as in the said first count aforesaid, or any or either of them, for his acceptance, or dispense with the same, or any or either of them, in manner and form as the plaintiff had in his said first count alleged,— concluding to the country.

The cause was tried before *Wilde*, C. J., at the sittings at *Westminster* after the last term, when a verdict was found for the defendant.

Byles, Serjt., now moved for a new trial, on the ground that the verdict was against evidence, or for judgment *non obstante veredicto*, on the ground that the plea, the issue upon which was found for the defendant, was a traverse of an immaterial allegation. The declaration would have been perfectly good without the allegation that the defendant exonerated and discharged the plaintiff from tendering the indenture for execution. It is not necessary for a party, in a case of this sort, to make such a tender: it is enough if he be willing to execute the indenture, and requests the defendant to do so, and he refuses. In *Poole* v. *Hill* (*a*), it was held that a declaration in covenant by the vendor against the intended purchaser of lands, for non-payment of the purchase-money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant: but it is sufficient to allege that the

(*a*) 6 *M.* & *W.* 835.

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plaintiff has always been ready and willing to execute a conveyance; inasmuch as, in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance, and tender it to the vendor for execution. Lord *Abinger*, in delivering the judgment of the court, there says: "The defendant could not have maintained an action for the non-completion of the purchase, without averring that he had tendered a conveyance. He was to perform the initiative, before the plaintiff could be called upon to offer a conveyance; and the plaintiff was not bound to execute a conveyance until the defendant had prepared and tendered it for execution." So, in *Wilmot* v. *Wilkinson* (*a*), it was held, that, upon the refusal of the vendee to accept the title, the vendor is not bound to tender a conveyance. And *Stephens* v. *De Medina* (*b*) shews that the like rule applies in the case of a sale of chattels: it was there held, that, where railway shares are, by the act constituting the company, made transferable by writing only, the purchaser of such shares cannot maintain an action for not transferring, unless he has previously tendered a conveyance to the seller for execution; and his declaration must aver such tender. [*Maule*, J. All that *Wilmot* v. *Wilkinson* decides, is, that, where the vendee says to the vendor, "I will not accept your title," the latter is not bound to tender a conveyance, even though he has stipulated that the conveyance shall be prepared by him. There is but a very loose analogy between the case of a sale and a contract of apprenticeship.] A stamp would be requisite: who is to pay for that in the first instance? [*Wilde*, C. J. There is no rule of law upon the subject.] Assuming that the plaintiff was bound to prepare and to tender the indenture for execution by the defendant,

(*a*) 6 *B. & C.* 506. (*b*) 3 *Gale & D.* 110.

— it was enough for the plaintiff to allege that he was ready and willing to execute, and that the defendant was requested to execute, and refused. [*Maule*, J. The allegation of dispensation expounds what goes before, and shews that that which *might* have been understood to amount to an allegation of tender, must not be so expounded here; for, though an allegation may be idle and superfluous, you cannot treat it as if it did not exist. There is no averment that the defendant had notice of the plaintiff's readiness and willingness to execute the indenture: I doubt, therefore, whether the declaration can be good. Readiness and willingness is a matter that is within the party's own mind only.] Taking the whole declaration together, it is submitted that it discloses a good cause of action.

Wilde, C. J. The question here is, whether the verdict, which has been found,—and, upon the evidence, we think, properly found,—for the defendant, has been found upon an issue that is immaterial. What is the nature of the contract? Is all to be done on the one side? or, is there something to be done to perfect the contract on both sides? Undoubtedly, in a case of this sort, the signature of the master is indispensable. If so, and the master complains of a breach of the contract, what is it necessary for him to allege? Suppose the old form of indenture had been still in use, where the instrument was cut in two, and each party took a part of it,—how would the case have stood then? It seems to me that the acts to be done by the plaintiff on the one side, and by the defendant on the other, were to be contemporaneous: and that, before the plaintiff complains of the non-performance of the contract by the defendant, he should have put himself in a condition to ask for performance, by being prepared to deliver what the defendant was entitled to receive. This per-

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formance on the part of the plaintiff may be dispensed with or discharged, by a notice from the defendant that he does not mean to execute the contract on his part. Now, what must the plaintiff in such a case aver? He must, I apprehend, at least aver that he was ready and willing to execute the deed, and that the defendant had notice of his readiness and willingness. Here, the plaintiff does not aver that the defendant had such notice. He merely alleges that the defendant refused to pay the *5l.* or to accept the bills, and exonerated and discharged the plaintiff from tendering the indenture to him for execution. The declaration would, I apprehend, clearly have been bad without that allegation. Supposing you could intend the allegation of readiness and willingness alone as amounting to a tender, the subsequent allegation here, prevents that meaning from being given to it. Taking this declaration simply to allege readiness and willingness, and no notice thereof to the defendant, it clearly discloses no good ground of action. Supposing the declaration to be good, it is only made so by reason of the allegation which is traversed by the plea: the issue, therefore, is not an immaterial one. There is consequently no ground for arresting the judgment.

MAULE, J. I am of the same opinion. The lord chief justice is satisfied with the verdict: and in that I concur with him. The defendant has entered into a contract that he will make and execute an indenture. The contract being executory, and each to have a part, each party should have been ready to perform his part of it, and was bound to give notice to the other of such readiness, before he could complain of non-performance. In the declaration, there is no allegation of notice of the plaintiff's readiness and willingness; but it is averred that the defendant exonerated and discharged the plaintiff from tendering the indenture for execution, — not

that he exonerated and discharged him from giving notice of his readiness and willingness to perform the contract on his part. That is consistent with the parties having made an agreement to do concurrent acts, and that the plaintiff should tender an indenture before he could call upon the defendant to execute one, and that the defendant afterwards had dispensed with the formality of a tender. That would still leave the agreement untouched to this extent, that the parties should concurrently do those acts. Now, it is quite clear that one party cannot maintain an action against another for not doing a concurrent act, without averring that he was ready and willing to perform his part, and that the defendant had notice of such his readiness and willingness. This declaration does not contain any such allegation. I therefore think it bad; and I also think that the allegation which is traversed, and the issue upon which is found for the defendant, does not interfere with his right to judgment. Supposing the declaration to be a good one, it is only by that allegation that it is made so; and therefore the issue upon it cannot be an immaterial one. A repleader takes place where, on the matters alleged and found on the record, the court cannot see which way the judgment should be pronounced; and that is the case where an immaterial averment in the declaration is traversed and found for the defendant. The case for a repleader, therefore, does not arise here; for, the court can see that the matters which are contained in the declaration, and not negatived by the finding of the jury, shew no right of action in the plaintiff, and therefore can see, that, in giving judgment in conformity with the verdict, they run no risk of giving a judgment that is contrary to the justice of the case; for, assuming all the allegations not found by the jury to be true, the defendant will still be entitled to judgment.

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Cresswell, J. I am of the same opinion. We cannot, upon this record, give judgment for the plaintiff. By the declaration, an agreement is shewn, by which the parties were to do concurrent acts. To entitle the plaintiff to sue for the non-performance of the contract by the defendant, he was bound to shew, either that he had performed his part, or that he was ready and willing to perform it, and that the defendant had notice thereof. The declaration does not shew notice, and therefore it is bad. If it is to be said that the declaration is rendered good by the subsequent allegation, that the defendant exonerated and discharged the plaintiff from tendering an indenture, that is a material allegation, and, being traversed, and found for the defendant, the defendant is entitled to judgment. As to the repleader,—I entirely agree with the rule laid down by my brother *Maule*. Assuming that the averment traversed by the plea is material, we can see here that the plaintiff is not entitled to judgment. Another rule upon this subject, is, that a repleader is not granted to the party who has made the first default in pleading. Here, the first fault is in the plaintiff, unless the last allegation makes the declaration good.

Williams, J. I am of the same opinion. It appears to me that the allegation which is traversed by the plea, is a material and necessary allegation; and that the issue thereon having been found for the defendant, he is entitled to our judgment.

Rule refused.

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WEST *v.* BAXENDALE.

Jan. 19.

In trespass for false imprisonment, a plea justifying the apprehension of the plaintiff on suspicion of felony, set out various circumstances of suspicion, and, amongst others, stated a conversation alleged to have been had by the plaintiff with one *A.* At the trial, the whole of the plea was proved, except that the conversation alleged to have been had by the plaintiff with *A.*, was had with *B.*

THIS was an action of trespass for an assault and false imprisonment.

The defendant pleaded,—first, not guilty,—secondly, that, shortly before the supposed trespass in the declaration mentioned, to wit, on, &c., at or about 9 o'clock in the evening, in the county of *Middlesex*, certain goods and chattels of one *Joseph Baxendale*, to wit, fifty silver forks, fifty silver spoons, &c., of great value, to wit, of the value of 100*l.*, were with force and arms feloniously stolen from the dwelling-house of the said *Joseph Baxendale*, by some person to the defendant unknown, against the peace, &c.; that the plaintiff, before the committing of the said theft, had been in the service of the said *Joseph Baxendale*, as coachman, and had been discharged therefrom, and was well acquainted with the said house and premises of the said *Joseph Baxendale*, and knew that the said plate was in the possession of the said *Joseph Baxendale*, and where the said plate was usually kept; that the said plaintiff, on the evening of the day on which the said felony was

The defendant applied to the judge to amend the plea, by inserting therein the name of the right person; which was refused.

In leaving the case to the jury, the judge told them they must exclude from their consideration the statement as to the conversation with *A.*, and say whether the facts which were proved, and which were known to the defendant at the time he caused the plaintiff to be apprehended, were sufficient to cause a reasonable and cautious man, acting *bonâ fide*, and without prejudice, to suspect the plaintiff of the offence charged: —

Held, a misdirection, — inasmuch as it was leaving to the jury what it was the province of the judge to determine: and, held, that the amendment was one which might have been made, upon terms, under the latter branch of the *3 & 4 W. 4. c. 42. s. 23.*

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committed, and shortly before the same was committed, was seen by a certain person who knew him, and whom he knew, to wit, one *Osman*, in the neighbourhood of the said house, and not in the place where the plaintiff usually resided or was, or had any lawful business, and that the plaintiff then endeavoured to avoid being seen or recognised by the said person, and affected not to know him, but, upon being then accosted and recognised by the said person, requested him not to inform the said *Joseph Baxendale*, or any of his family or servants, that the said person had seen him on the occasion aforesaid; that the plaintiff was also, on the evening of the day on which such felony was committed, and shortly before it was committed, seen to go in the direction of the place where it was committed; that, at such time after the committing of the said felony as a person would take to pass quickly from the said house along a certain close of the said *Joseph Baxendale*, adjoining thereto, and out of a certain gate of and belonging to the said close and house, and which led from the same unto and into a certain public highway,—into which a person who had committed the said felony was likely to have run and escaped,—a person was heard to pass suddenly out of and away from the said house, along the said close, and through the said gate, with a step like that of the plaintiff, and which a certain person, to wit, one *Sutton*, who heard the same, and who knew the plaintiff, and the sound of his step, believed to be his; that a certain dog of the said *Joseph Baxendale*, which knew the plaintiff, and would not bark at him, but was accustomed to bark furiously at strangers whom it perceived in the said premises of the said *Joseph Baxendale*, on the occasion aforesaid perceived a person who so passed away from the said house, over the said close, and through the said gate as aforesaid, whilst in and upon the said premises of the

said *Joseph Baxendale*, and then recognised the said person as one whom he knew, and then followed the said person whose step was like the plaintiff's, without barking; that a person resembling the plaintiff was the said person, and was seen to pass, and did pass, through the said gate within a few minutes after the said felony was committed, and in such time as a person might have come swiftly from the place where the said felony was committed, and the said person did then take to flight along the said highway; that the plaintiff, on the occasion and at the time aforesaid, or any part thereof, had not any business or right to be in the said house or close of the said *Joseph Baxendale*, or to pass through the said gate; that human footsteps were, on the morning of the day after the committing of the said felony, seen near the said house, on the said close, in the direction taken by the said person who so passed through the said gate as aforesaid, which footsteps resembled the plaintiff's, and which the defendant then, and before and at the said times when &c., believed to be the plaintiff's; that the said felony was committed by the said person who passed through the said gate on the occasion aforesaid; that the defendant never had any reason or ground to believe or suspect that any other person than the plaintiff was guilty of the said felony, and the defendant, before and at the said time when &c., *being informed of and knowing the premises, and having reasonable and probable cause to suppose, suspect, and believe, and then supposing, suspecting, and believing, that the plaintiff had committed the said felony*, did forthwith, to wit, at the said time when &c., cause the plaintiff to be arrested and taken, for the purpose of being carried before a justice of the peace, to answer the premises, and be dealt with according to law in respect thereof; that, for the purposes aforesaid, the defendant, at the said

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time when &c., necessarily caused the plaintiff to be gently assaulted and laid hold of, and to be gently compelled to go in custody as in the declaration mentioned; that, because it was very late in the evening when the plaintiff was arrested, and an unreasonable time to take him before such justice as aforesaid, the defendant unavoidably detained him for a reasonable time, and in a reasonable manner, in the said house in the declaration mentioned, the same being a reasonable and convenient place; that the defendant did, at and within a reasonable time, and in a reasonable manner, after the said arrest, cause the plaintiff to be taken in custody before the said justice of the peace, to answer the premises and be dealt with according to law; that the defendant, on the occasion aforesaid, did no more than was necessary for the purpose of arresting the plaintiff and keeping him in safe custody until he could be carried before a justice of the peace, to answer the premises, and be dealt with according to law; and that these were the same supposed trespasses whereof the plaintiff had above complained against the defendant, —verification.

To this plea the plaintiff replied *de injuriâ;* whereupon issue was joined.

The cause was tried before *Wilde*, C. J., at the sittings at *Westminster* after *Michaelmas* term, 1848. The facts which appeared in evidence were as follows:—The defendant occupied a large mansion in the neighbourhood of *Finchley*. The plaintiff had been in his service in the capacity of coachman, and consequently was well acquainted with the premises, and knew where the plate was kept. The plaintiff was dismissed from the defendant's employ in *February*, 1848, since which time he had resided at *Gloucester Mews, London*. On the 6th of *March*, about 9 o'clock in the evening, the butler missed a tray full of plate from a

closet in his pantry, where it had been seen safe a short time before, and, notwithstanding immediate search was made for it, it could not be found. On the following morning, the defendant's bailiff, crossing the lawn, discovered the empty tray under a tree in the shrubbery. On the afternoon and evening of the day on which the robbery took place, the plaintiff was seen at *Whetstone*, in the immediate vicinity of the defendant's house, and had made an appointment to meet a person at a public-house there at a later hour in the evening, but did not keep it. He returned home to *Gloucester Mews*, on the night in question, in a cab, the horse attached to which appeared very much distressed, as if he had come a considerable distance, and had travelled fast.

It further appeared, that the plaintiff, when he was in the service of the defendant, had the care of the dogs; that, about 9 o'clock on the evening of the robbery, the defendant's then coachman, who lived at the porter's lodge, heard a person coming from the house towards the gate; and that one of the defendant's dogs, which was in the habit of barking at strangers, was heard to "sniff" at the man, as if he recognised him, but did not bark. And a witness who saw the man come out at the gate, but was unable to identify him, described him as having had on a round jacket, resembling one which the plaintiff wore when seen that night at *Whetstone*.

The only fact in the plea which was not proved distinctly as alleged, was, that the plaintiff had been seen by one *Osman* in the neighbourhood of the defendant's house on the evening in question, shortly before the robbery, and, when accosted by *Osman*, requested him not to inform the defendant, or any of the family or servants, that he had seen him. The fact itself was proved, but the name of the witness was *Hawley*, and not *Osman*.

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On the part of the defendant, it was submitted, that the plea was divisible, and that it was enough to prove so much of it as would justify the suspicion that the felony had been committed by the plaintiff: and the learned judge was asked to amend the plea, by substituting the name of *Hawley* for that of *Osman*. This was objected to by the plaintiff's counsel, who said they came prepared to cross-examine *Osman*, but were not prepared to deal with the witness proposed to be substituted for him.

The learned judge declined to allow the amendment, reserving to the defendant leave, on motion, to question the propriety of such refusal.

The lord chief justice told the jury that they must exclude from their consideration what had been shewn to have passed between the plaintiff and *Hawley;* and he left it to them to say whether the other facts, so far as they had been proved to their satisfaction, and which were known to the defendant at the time he caused the plaintiff to be apprehended, were sufficient to justify a reasonable man, acting with ordinary caution, and without prejudice, in suspecting that the felony had been committed by the plaintiff.

The jury returned a verdict for the plaintiff, damages 25*l.*

Byles, Serjt., in *Hilary* term last, moved for a new trial, on the ground of misdirection, an improper refusal to amend the plea, and that the verdict was against evidence. Since the case of *Panton* v. *Williams* (*a*), all that is for the jury to determine, is, what are the facts, which of them were within the knowledge of the defendant at the time, and did the defendant act *bonâ fide;* the question of reasonable and probable cause

(*a*) 2 *Q. B.* 169., 1 *Gale & D.* 504.

being entirely a question of law for the judge. Here, the whole, the law as well as the fact, was left to the jury. The plea,—which was founded upon the case of *Mure* v. *Kaye* (*a*),—was substantially proved. It was clear that a felony had been committed, and that the defendant acted with *bona fides*. [*Wilde*, C. J. The plea was entirely proved, with the exception of the statement about *Osman*.] It was not necessary to prove the *whole* of the facts stated in the plea: it was enough to prove so much of them as shewed reasonable ground for suspicion. The part which was not proved was not material: the defendant was not bound to prove the name of the person with whom the conversation was alleged to have taken place. [*Maule*, J. Would the plea be a good one, omitting the name?] That is not the true test. [*Maule*, J. I should say, that, if it is necessary to specify a particular person, the plea must in terms be proved,—like a day that is laid as matter of substance. *Wilde*, C. J. Suppose the plea had alleged a confession to *A. B.*; would you have proved your plea, by shewing a confession to *C. D.*?] It would not be necessary to state in the plea the name of the person to whom the confession was made. The sole object of the plea, is, to enable the court to see whether or not the circumstances form a ground of reasonable suspicion. [*Maule*, J. If you substitute a different person, you prove a different ground of suspicion. You do not allege suspicion, but upon this ground as well as others.] The defendant is not bound to prove *all* the grounds of suspicion alleged. [*Maule*, J. In the case of a plea justifying the dismissal of a servant, the cause of dismissal alleged need not be entirely proved. But that is not quite a parallel case: the whole is not tied together as being the ground of one suspicion.] The learned judge clearly erred in leaving

(*a*) 4 *Taunt.* 34.

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it to the jury to say whether or not there was reasonable ground of suspicion. In *Wedge* v. *Berkeley* (*a*), the direction was in that form: but the law has since been settled the other way, in *Panton* v. *Williams*.

A rule nisi having been granted,

Wilkins, Serjt., *Hawkins*, and *Bailey*, now shewed cause. The plea is bad, and therefore, as a verdict for the defendant would not avail him, the court will not send the cause down to a new trial. In *Mure* v. *Kaye* (*b*), it was held that a plea justifying an arrest by a private person, on suspicion of felony, must shew the circumstances, from which the court may judge whether the suspicion was reasonable. [*Maule*, J. Suppose the plaintiff does not choose to demur? It is not for the judge at nisi prius to inquire whether the plea is good or not.] Whether there was reasonable or probable cause or not, depends upon a variety of facts, all of which must not only exist, but must have been communicated to the defendant, and have been believed by him to be true; and they must be such as furnish ground for the arrest of the plaintiff. The former being found by the jury, the latter is for the consideration of the judge. Here, the lord chief justice told the jury, in effect, that the facts alleged in the plea afforded reasonable ground of suspicion, if they, the jury, were satisfied that they were communicated to the defendant, and he *bonâ fide* acted upon them. The jury found that enough was not proved, to amount to a justification. In *Davis* v. *Russell* (*c*), the defendant, a constable, being told by one *A*. that the plaintiff had robbed her, and the information being countenanced by a supposed intercepted letter which was shewn to him, apprehended the

(*a*) 6 *Ad. & E.* 663., 1 *N. & P.* 665., *W. W. & D.* 271.

(*b*) 4 *Taunt.* 34.

(*c*) 5 *Bingh.* 354., 2 *M. & P.* 590.

plaintiff, a respectable inhabitant of *Cheltenham*, at her lodgings, and took her from her bed, at night, to prison. The charge proving unfounded, the plaintiff sued the constable for the false imprisonment; and the judge at the trial directed the jury to consider whether the foregoing circumstances afforded the defendant reasonable ground to suppose that the plaintiff had committed a felony, and whether, in his situation, they would have acted as he had done: and the court held that this direction was substantially correct. In *Beckwith* v. *Philby* (*a*), the direction was almost in terms the same as here. [*Williams*, J. In *Davis* v. *Russell*, the jury found for the defendant: and, in *Beckwith* v. *Philby* the direction was not objected to. The leading case now upon this subject is *Panton* v. *Williams*. (*b*) It was there laid down by the Exchequer Chamber, that, in an action for indicting maliciously and without probable cause, if the defendant set up facts as shewing probable cause, the judge must determine whether the facts, if proved, or any of them, constitute such cause: the jury are only to decide whether the facts, or facts inferred from them, exist; and this, however complicated or numerous the facts may be. *Maule*, J. The defendant pleads that he had reasonable cause to suspect, and *did* suspect. The facts were in dispute. The lord chief justice left it to the jury to say whether the facts proved, amounted to such reasonable and probable cause as would justify a reasonably prudent man in suspecting the plaintiff. It may be that the jury found that a number of facts existed, but found for the plaintiff because *they* thought those facts did not amount to reasonable and probable cause. The summing up certainly does seem, implicitly, to leave the question of reasonable and probable cause to the jury.] The rule is thus laid down by Lord

(*a*) 6 *B. & C.* 635., 9 *D. & R.* 487.

(*b*) 2 *Q. B.* 169., 1 *Gale & D.* 504.

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Denman, in *Turner* v. *Ambler* (*a*): "The prevailing law of reasonable and probable cause, is, that the jury are to ascertain certain facts, and the judge is to decide whether those facts amount to such cause. But, among the facts to be ascertained, is, the knowledge of the defendant, of the existence of those which tend to shew reasonable and probable cause; because, without knowing them, he could not act upon them; and also the defendant's belief that the facts amounted to the offence which he charged; because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding: and, perhaps, whether they did so or not, is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred." It was impossible that the lord chief justice could have forgotten the rule now so long and so well settled, that reasonable and probable cause is for the judge only. In substance, it is submitted, the direction was right.

The learned judge was also right in refusing to allow the proposed amendment. The plea alleged the conversation to have taken place with *Osman:* to have permitted the name of another person to be substituted for *Osman*'s, would clearly have prejudiced the plaintiff in the conduct of his action. In *Boucher* v. *Murray* (*b*), a declaration on a guarantee stated, that, in consideration that the plaintiff would *make advances* of money by way of loan to *B.*, the defendant promised to repay the plaintiff such sums as he should so

(*a*) 10 *Q. B.* 252, 260. (*b*) 6 *Q. B.* 362.

advance, if *B.* should make default; and alleged for breach, that *B.* made default, and that the defendant did not pay the plaintiff. To this the defendant pleaded, that the plaintiff did not *make* the said advances to *B.*, in manner and form, &c. At the trial, the judge ordered the declaration and plea to be amended, by stating in the count, that, in consideration that the plaintiff would *procure the* British *and* Australian Bank, *in which the plaintiff was a partner*, to make advances &c. to *B.*, the defendant promised to repay *the said bank* such sums as the plaintiff should so *cause to be advanced*, &c.; and, in the plea, that the plaintiff did not *procure the said bank* to make the said advances: and it was held that such amendment was not warranted by the statute. And in *Bowers* v. *Nixon* (*a*), it was ruled by *Maule*, J., that "the enactments for allowing amendments at nisi prius, were intended to meet variances arising from mere slips or accidents, and that they do not extend to a case in which the party has intentionally and designedly framed his pleading in a manner which gives rise to the objection." [*Maule*, J. In *Pratt* v. *Hanbury* (*b*), where there was a plea of justification in an action for a malicious prosecution on a charge of receiving stolen goods, alleging that the goods had been stolen by "some person unknown," and the evidence at the trial shewed that the plaintiff had received the goods from a servant of the defendant, named *John Press*,—it was held that the judge at nisi prius properly exercised his discretion, in allowing the plea to be amended by striking out the words "some person unknown," and substituting the words "*John Press*." The statute 3 & 4 *W.* 4. *c.* 42. *s.* 23. contemplates two cases in which amendments are to be allowed, —first, where the variance is in a matter, which, in the

(*a*) 2 *Carr. & K.* 372. (*b*) 19 *Law Journ. N. S., Q. B.* 17.

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judgment of the court or judge, is not material to the merits of the case, and one by which the opposite party *cannot* have been prejudiced in the conduct of his action or defence,—secondly, where it is in a matter not material to the merits of the case, but by which the party *may* have been prejudiced. In the latter case, the amendment is to be allowed upon reasonable terms. This seems to have been a case falling within the latter branch of the statute, and one in which an amendment might properly have been allowed, if properly asked for.]

Byles, Serjt., and *Willes*, in support of the rule. The plea shews that a felony had been committed, and it discloses circumstances reasonably calculated to excite the suspicion which the defendant entertained and acted upon. The direction of the learned judge was clearly wrong: he left to the jury what he ought himself to have determined, *viz.* the existence of reasonable and probable cause. [*Maule*, J. It was for the jury to say whether the facts pleaded were proved, and for the judge to determine whether or not they amounted to reasonable and probable cause,—reasonable and probable cause, not for suspecting, but for imprisoning the plaintiff.] Whatever is reasonable and probable cause for suspecting, is reasonable and probable cause for arresting. The judge was also wrong in telling the jury to exclude from their consideration all about the communication to *Osman* (or *Hawley*): it was at all events admissible to shew that the defendant acted *bonâ fide*.

MAULE, J. I am of opinion,—and I believe my learned brothers all agree with me,—that the rule must be made absolute for a new trial, on the ground of misdirection. If the direction of the lord chief justice in substance was, that the jury were to consider whether

the facts stated in the plea were true, and whether they amounted to reasonable and probable cause, then, no doubt, the direction was wrong. That the direction took that precise form, however, is not quite clear. But it seems not to be disputed, that his lordship did go on to say, that, in considering the grounds of the defendant's suspicion, they must exclude from their minds the fact of the alleged conversation with *Osman* (or *Hawley*, as it turned out). That clearly was not correct. It was a material fact, and might have influenced their decision. I think the objection an insuperable one. Our decision necessarily involves this—that the plea would have been a perfectly good plea without the allegation about *Osman*. If the plea, without that allegation, would have been insufficient, the plaintiff would have been entitled to a verdict.

It is unnecessary to decide the other points. I incline to think that the amendment which was proposed, was in a matter not material to the merits of the case, but that it was in a matter, by the amendment of which the opposite party might have been prejudiced in the conduct of his cause; and therefore that it was one which ought to have been made, upon such terms as the judge might think reasonable, under the concluding part of the 3 & 4 *W.* 4. *c.* 42. *s.* 23.

The rest of the court concurring,

Rule absolute accordingly.

BELL, Public Officer of THE NATIONAL PROVINCIAL BANK OF ENGLAND, *v.* WELCH and ADAMS.

Jan. 29.

The defendants gave the plaintiff the following guarantee: — "We, the undersigned, hereby indemnify the *National Provincial Banking Company*, to the extent of 1000*l.*, *advanced or to be advanced* to *R. P.*, by the said company." It appeared, that, at the time the guarantee was given, *R. P.* was indebted to the bank in a sum exceeding 1000*l.*: — Held, that the guarantee did not, upon the face of it, or construed with reference to the extrinsic circumstances, disclose a sufficient consideration.

A declaration upon the above guarantee, stated, that, at the time of making the agreement, &c., *R. P.* kept an account with the company, and was indebted to them in 800*l.* for money advanced; that it was proposed between *R. P.* and the company, that the company should advance him divers other moneys not then agreed upon; and that thereupon the agreement (setting it out) was entered into: the declaration then proceeded to allege, that, "in consideration of the premises," the parties mutually promised, &c., that the company did advance to *R. P.* divers large sums, amounting to 1000*l.*, and forbore and gave day of payment to *R. P.*, &c.: — Held, that the whole of the allegations preceding the mutual promises, formed part of the consideration for the defendants' promise, and were all put in issue by non assumpsit.

ASSUMPSIT on a guarantee. The declaration stated, that, at the time of the agreement thereinafter mentioned, the plaintiff was registered public officer of the *National Provincial Bank of England*, carrying on business at *Blandford*, in the county of *Dorset*; that one *Richard Pinney* kept a certain banking-account with the said company, at their branch bank at *Blandford*, and was indebted to the company in 800*l.*, for money advanced by them to the said *Richard Pinney*, and it was then proposed between the said *Richard Pinney* and the said company, that the said company should advance to the said *Richard Pinney* divers other moneys not then agreed upon; that thereupon, afterwards, to wit, on the 4th of *October*, 1847, a certain agreement in writing was made and entered into by the said company and the defendants, and was signed by the defendants, in the words following: — "We, the undersigned, hereby indemnify the *National*

Provincial Bank of England to the extent of 1000*l.*, *advanced or to be advanced* to Mr. *Richard Pinney*, of *Hamworthy*, ship-builder, by the *Blandford* branch of that establishment; but the said indemnity to cease when the said *Richard Pinney* shall have paid in the said sum of 1000*l.* to the credit of his account:" Mutual promises: Averment, that the said company did advance to the said *Richard Pinney* divers large sums of money amounting to 1000*l.*, and forbore to the said *Richard Pinney*, and gave him day of payment of, the said sum so due to the said company at the time of making the said agreement by the defendants, from the time of making the said agreement, and forbore to him and gave him day of payment of the said sums so advanced to him after the making of the said agreement, from the time when the last-mentioned sums were respectively advanced, until the said *Richard Pinney* had had a reasonable time to pay the said sum of 1000*l.* in to his account, to wit, from the said several periods respectively up to the commencement of the suit: that the said company were always from the time of making the agreement and promise by the defendants, until and at and after the said *Richard Pinney* had had a reasonable time to pay in the said sum of 1000*l.* to the credit of his account, ready to receive the same,— of which the defendants had notice: that, although the said *Richard Pinney*, after the making of the said agreement, to wit, on &c., paid in to his account the small sum of 179*l.* 10*s.* 10*d.*, yet he did not pay in the residue of the sum of 1000*l.*, to wit, 820*l.* 0*s.* 2*d.*, or any part thereof, and the said agreement and promise of the defendants had been since the making thereof, and were still, in full force, virtue, and effect: that, at the expiration of the said reasonable time for the said *Richard Pinney* to have paid in 1000*l.*, to wit, on the 1st of *January*, 1848, he was indebted to the said company in a sum

[illegible] exceeding [illegible], to wit, [illegible], for money at the time of the making of the said agreement and promise of the defendants aforesaid or to be advanced to the said *Richard Pinney* by the said company, according to the true intent and meaning of the said agreement and promise of the defendants as aforesaid: yet that the said *Richard Pinney*, although requested so to do, had not paid the said last-mentioned sum, or any part thereof; that of this the defendants had notice, and were then requested by the said company to pay the last-mentioned sum, to the extent of 1000*l.*, according to the true intent and meaning of the said agreement and promise of the defendants in that behalf; yet that the defendants had not paid the same, or any part thereof.

There was also a count upon an account stated.

The defendants pleaded several pleas, but the only material one was non assumpsit; upon which the plaintiff joined issue.

The cause was tried before *Wilde*, C. J., at the sittings in *London* after last *Trinity* term. The facts that appeared in evidence were, that the plaintiff was the public officer of *The National Provincial Bank of England*, having a branch establishment at *Blandford*, in the county of *Dorset*, the business of which was conducted by one *May*; that one *Richard Pinney* had, for some years, banked at the *Blandford* branch, and had been allowed, on several occasions, to overdraw his account, upon the faith of guarantees, limited in point of time and amount, signed by the defendant *Welch*; and that, on the 8th of *July*, 1847, *May*, the manager of the *Blandford* branch, addressed and sent the following letters to *Richard Pinney*, and to *Welch*:—

"National Provincial Bank of *England*.
"*Blandford*, *July* 8. 1847.

"Dear Sir,—We are advised of the payment to your credit, *per London Joint*, of 350*l.* this morning; and

your acceptances will be duly advised. You must be aware that these transactions exhaust the temporary guarantee, and leave the bank comparatively unprotected: and I have, therefore, to beg you will either forward the permanent guarantee, which might be completed in ten minutes, or a fresh temporary one. All the unpleasantness and correspondence of this nature is occasioned by your own neglect, in not providing the promised permanent guarantee: and I have no doubt Mr. *Welch* will, upon your shewing him this note, give his attention to the matter without further delay.

"Yours, &c.

(Signed) "*J. May*, Manager."

"*R. Pinney*, Esq."

"National Provincial Bank of *England*.

Blandford, August 27. 1847.

"Dear Sir,—When I saw you in *Poole*, you told me you would forthwith forward me the permanent guarantee for Mr. *Pinney*. Your last temporary one has been some time exhausted; and I trust you will at once forward me the permanent guarantee, or a fresh temporary undertaking, as usual. Yours, &c.

(Signed) "*J. May*, Manager."

"*M. K. Welch*, Esq."

On the 4th of *October*, 1847, the following guarantee was given to *May*, signed by both the defendants:—

"*Poole, October* 4. 1847.

"We, the undersigned, hereby indemnify the *National Provincial Bank of England*, to the extent of 1000*l.*, *advanced*, or *to be advanced*, Mr. *Richard Pinney*, of *Hamworthy*, ship-builder, by the *Blandford* branch of that establishment; but the said indemnity

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to cease when he shall have paid in the said sum of 1000*l.* to the credit of his account.

(Signed) "*M. K. Welch.*
"*G. A. Adams.*"

At the time this guarantee was given, *Pinney* was indebted to the bank in 1400*l.* After the date of the guarantee, 312*l.* 11*s.* was advanced by them to *Pinney*, and 179*l.* 10*s.* 10*d.* was paid in by him to the credit of his account.

On the part of the defendants, it was submitted, that the guarantee was void for uncertainty, and for want of a sufficient consideration appearing on the face of it; and that the averment of the proposal between *Pinney* and the bank, that the latter should advance moneys to the former,—which, it was insisted, was put in issue by non assumpsit,—was not proved.

Under his lordship's direction, the jury found for the plaintiff, damages 1000*l.*, leave being reserved to the defendants to move to enter a nonsuit, upon the objections above mentioned, or to reduce the damages by the sum of 179*l.* 10*s.* 10*d.*

Channell, Serjt., in *Michaelmas* term last, accordingly obtained a rule nisi to enter a nonsuit, or to reduce the damages; or to arrest the judgment, on the ground that the declaration disclosed no good cause of action. He referred to *Raikes* v. *Todd* (*a*), *Johnston* v. *Nicholls* (*b*), and *Chapman* v. *Sutton.* (*c*)

Shee, Serjt., and *James Wilde*, shewed cause. The ground upon which a nonsuit is asked for, is, that the proposal alleged in the declaration, is part of the con-

(*a*) 8 *Ad. & E.* 846., 1 *P. & D.* 138.

(*b*) *Antè*, Vol. I. p. 251.

(*c*) *Antè*, Vol. II. p. 634.

sideration for the defendants' promise, and that there was no evidence of any such proposal. The guarantee itself, however, it is submitted, affords some evidence of a proposal; and, besides, it was shewn that the defendants had, on several previous occasions, given the bank temporary guarantees in the same form. Further, it is submitted, that it was not necessary to prove that allegation: it was mere matter of inducement. [*Maule*, J. Is it not made material and necessary to be proved, by the statement that it was part of the consideration for the defendants' promise?] But for the words "in consideration of the premises," there would have been no difficulty. [*Maule*, J. If it had been, "in consideration of the said proposal," it would have been difficult to say that the proposal was not put in issue.] Non assumpsit puts in issue the making of the promise upon the consideration stated: *Sutherland* v. *Pratt.* (*a*) Does it put in issue "the premises," as a matter of fact? [*Maule*, J. Where the promise is inferred from the consideration, non assumpsit puts it in issue.] The contract is set out in terms in the declaration: the whole consideration must appear upon the face of the instrument. "In consideration of the premises" means no more than "in that state of things." [*Maule*, J. It means, in truth, merely an averment of notice.] The premises themselves are not in the nature of a consideration. If the proposal is a material allegation, it is admitted: *Bennion* v. *Davison.* (*b*)

To make a guarantee good, it is necessary that the consideration should distinctly appear upon the face of it. It will be contended, on the other side, that it is doubtful whether the consideration for the guarantee, was past or future advances. "Advanced *or* to be advanced," must be read "advanced *and* to be ad-

(*a*) 11 *M. & W.* 296., 2 *Dowl. N. S.* 813.

(*b*) 3 *M. & W.* 179.

[illegible] would be sufficient [illegible] v. *Sutton* (*b*) [illegible] to be a guarantee for the [illegible] if no more [illegible] not. The declaration states that there had been a guarantee by *Finney* to the bank to advance money to him, and that 800*l.* only had been advanced. The guarantee is to indemnify the bank to the extent of 1000*l.* [illegible] If it had stopped there, there would have been an express promise of indemnity. [illegible] "Indemnify" implies a forbearance. [illegible] For how long?] For a reasonable time. [illegible] What is a reasonable time?] The case which seems to approach the nearest to this, is *Forbes* v. *Todd*. The guarantee there was,—"I undertake to see to the payment of any sums you have advanced, or may hereafter advance, to *D.* on his account with you, commencing, &c., not exceeding 2000*l.*" The declaration thereon stated that the plaintiffs had opened an account with, and made advances to, *D.*, commencing on &c., and that the guarantee was given in consideration of the premises, and also in consideration that the plaintiff, at the request of the party guaranteeing, would continue to advance further sums to *D.* on his said account with the plaintiffs: and it was held that the consideration did not sufficiently appear by the written instrument, to support the declaration: but two of the judges,—Lord *Denman* and *Coleridge*, *J.*,—seemed to think that the words imported a consideration of forbearance. In construing instruments of this nature, the court will look at the surrounding circumstances. In *Newbury* v. *Armstrong* (*d*), *Tindal*, *C. J.*, says: "We ought not to be too strict in

(*a*) *Ante*, Vol. 1. p. 231.
(*b*) *Ante*, Vol. 11. p. 634.
(*c*) 8 *Ad. & E.* 846., 1 *P. & D.* 188.
(*d*) 6 *Bingh.* 201., 3 *M. & P.* 509.

the construction of these instruments; for, if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life." In *Tanner* v. *Moore* (*a*), a declaration, in assumpsit, stated that *T.* had commenced an action against *M.* for 165*l.*; and that, in consideration of *T.*'s "agreeing to stay the said action," the defendant promised to pay *T.* the 165*l.* within six months next after the decease of *A.* The promise, as proved, was, to pay, as above, in consideration of *T.*'s "having agreed" to stay the action; and it was held that this was no variance, and that a valid consideration was proved. In delivering the judgment of the court, Lord *Denman* there says: "Here, the declaration speaks of the consideration as the plaintiff's *agreeing to stay*, &c. Now, that word necessarily implies a continuing agreement till the action is stayed: and the words of the instrument, 'having agreed,' necessarily imply the same; for, it would be absurd to suppose that the defendant bound himself to pay the money, in consideration of the plaintiff's merely having at a past time agreed to stay the proceedings, unless that agreement was continuing at the time of the signing of the instrument, and until the action was actually stayed." So, here, it would be absurd to suppose that the defendants would consent to guarantee the past account, unless something future was to be done by the bank for *Pinney*'s benefit. In *Haigh* v. *Brooks* (*b*), the guarantee was in these terms:—"Messrs. *H.* In consideration of your being in advance to *L.* in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf:" and it was held, by the court of error (*c*), that the guarantee did not

(*a*) 9 *Q. B.* 1.
(*b*) 10 *Ad. & E.* 309., 2 *P. & D.* 477.
(*c*) *Brooks* v. *Haigh*, 10 *Ad. & E.* 323., 4 *P. & D.* 288.

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necessarily imply a past advance; and that the plaintiffs, on a trial, might have offered evidence to shew that future advances had been contemplated. In *Goldshede* v. *Swan* (*a*), in an action on the following guarantee,—"In consideration of your having this day advanced to our client, Mr. *V. D.*, 750*l.*, secured by his warrant of attorney, payable on the 22nd of *August* next, we hereby jointly and severally undertake to pay the same on default, &c. Dated the 22nd of *June*, 1840,"—the declaration stated, that, in consideration that the plaintiff would, on the 22nd of *June*, 1840, lend to one *V. D.* 750*l.*, on the security of a warrant of attorney, payable on the 22nd of *August* then next, and would forbear and give time to *V. D.* until the 22nd of *August*, the defendant promised, &c.: and it was held, that the instrument was sufficiently ambiguous to admit of evidence to shew that the advance was not a past one, but was made simultaneously with the execution of the guarantee; and that no amendment of the declaration was necessary. *Parke*, B., there said: "I entertained some doubt, at first, whether the consideration which appears on the face of this guarantee, was sufficiently ambiguous to let in an explanation. But, on the authority of the cases of *Haigh* v. *Brooks* and *Butcher* v. *Steuart* (*b*), I think it is. I think that the evidence was properly admitted, not for the purpose of contradicting the instrument, but to explain the meaning of its terms. It was proved that no money had been advanced before the execution of the instrument: it must, therefore, be read as pointing to future advances: and there is nothing inconsistent or unnatural in this construction. Upon this ground the Queen's Bench proceeded in *Haigh* v. *Brooks;* and nobody can doubt that, in that case, the memorandum might be read as

(*a*) 1 *Exch.* 154. (*b*) 11 *M.* & *W.* 857.

referring to a past event. So, in *Butcher* v. *Steuart*, it was shewn that no release had been procured; and the time was held to be a future one. *Butcher* v. *Steuart* was recognised in *Tanner* v. *Moore*. Now, reading this instrument with the facts given in evidence, there is nothing inconsistent with its being for a future event. I, however, found my opinion upon the cases of *Haigh* v. *Brooks* and *Butcher* v. *Steuart*." [*Williams*, J. Would the present guarantee attach immediately? or only upon future advances being made?] In the latter event, probably. The court will look at the existing state of circumstances, as apparent on the face of the record, in construing the instrument. In *Chapman* v. *Sutton* (*a*), the guarantee was almost in terms the same as this: it was—"In consideration of advances *made and to be made* by *A.* & *B.*, or by any other persons of whom their firm may, from time to time, consist, in the way of loan, &c., we jointly and severally hereby guarantee to *A.* & *B.* the repayment of the said advances, and to indemnify them against any loss by reason of such advances; our liability not to exceed 1000*l.*," &c.: and it was held that it disclosed a sufficient consideration. In *Johnston* v. *Nicholls* (*b*), *B.* gave *A.* the following guarantee,—"As you are about to enter upon transactions in business with *C.*, with whom you have already had dealings, in the course of which *C.* may, from time to time, become indebted to you; in consideration of your doing so, I hereby agree to be responsible to you for, and guarantee to you, the payment of any sums of money which *C.* now is, or may at any time be, indebted to you, so that I am not called upon to pay more than the sum of 2000*l.*" There had been considerable dealings between *A.* and *C.* prior to the date of the guarantee, consisting of loans of money, payments made for, and

(*a*) *Antè*, Vol. II. p. 634. (*b*) *Antè*, Vol. I. p. 251.

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goods supplied to, *C.* by *A.*, the credit upon which had not then expired; and those dealings had been, to a small extent, since continued. The declaration alleged the existence of the prior dealings between *A.* and *C.*, of the three descriptions above mentioned, and then went on to state, that, in consideration that *A.* would continue such dealings as aforesaid with *C.*, *B.* promised *A.* to be responsible for, and to guarantee, the payment of any sums of money which *C.* then was, or at any time thereafter might be, indebted to *A.*, in the course of such dealings as aforesaid,—*that is to say, as well in respect of the said sums of money so lent and advanced on credit as aforesaid, and of the said sums of money so paid, laid out, and expended on credit as aforesaid, and of the said goods so sold on credit as aforesaid, and which respective credits were wholly unexpired as aforesaid at the time of the making of the said promise, as also in respect of such dealings so to be continued as aforesaid,* so that *C.* should not be called on to pay more than 2000*l.* It was held, that the guarantee disclosed a sufficient consideration for the payment, as well of the past as of the future debt; and that there was no variance between the declaration and the proof. *Erle*, J., there said: "The written agreement that was produced in proof, required some parol evidence to shew its application; and it might properly be explained, by shewing the nature and character of the dealings prior and subsequent to it: and I think the evidence given was quite consistent with the guarantee itself, and with the expansion of it in the declaration." The meaning of the guarantee in the present case, is, that the bank have advanced, and may in future advance, money to *Pinney*, and that, if they do make future advances, the defendants undertake to indemnify them against the whole, both past and future. Consistently with the nature of the transactions disclosed by the evidence, the court can

put no other construction upon it. [*Maule*, J. In that case, you are reduced to this difficulty, that the paper shews no consideration upon the face of it.] It must be assumed that the bank were not *at once* to sue the customer for the past advances. Unless that were so, the undertaking would have been simply an undertaking to pay the existing debt.

As to the reduction of damages, it appears that 179*l.* 10*s.* 10*d.* had been paid into the bank by *Pinney*, and the defendants claim to set off that sum in reduction of their liability upon the guarantee. To do this, will be doing violence to the language of the guarantee. [*Maule*, J. You do greater violence to the *sense* of the document, if you do not allow the set-off.]

Channell, Serjt., and *Barstow*, in support of the rule. The allegation in the declaration, which precedes the statement of the defendants' promise, clearly was put in issue by non assumpsit, unless it can be said to be mere surplusage, which, it is submitted, it cannot be. "The premises" are merely a promise for the debt or default of a third person, and therefore the case would be within the statute of frauds. Now, it is quite settled, that the promise as well as the consideration must be collected from the face of the guarantee. The declaration alleges that 800*l.* was due from *Pinney* to the bank: the evidence was, that 1400*l.* was due. It may be conceded that the court, in dealing with an instrument of this sort, will not look at the adequacy of the consideration. It may also be conceded, that, if there had been an engagement on the part of the bank to make future advances, or to forbear to press for payment of past advances, the guarantee would have been good. So, if the contract had been conditional,—to attach, on future advances being made. But, here, there is no contract to forbear, no engagement for future

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advances; nor is the contract conditional; it is alternative. In the cases referred to, the parties confessedly could not have contemplated a liability to arise on the part of the defendant, except in the event of goods being supplied or money advanced. But, here, the parties may have contemplated, and evidently *did* contemplate, the defendants' being liable, even though no future advances were made. To that contemplation the law will not give effect. In *Newbury* v. *Armstrong*, the whole consideration for the defendant's undertaking was *in futuro*. [*Maule*, J. Do you contend, with reference to the statute of frauds, that evidence may not be given of matters of fact in relation to which the contract was entered into?] It is not necessary to go that length. [*Maule*, J. May not the debt, where its amount is left in doubt, be shewn otherwise than by writing?] It may be conceded that it may, though even that may be subject to some qualification. It is not contended that the written contract can never be explained by parol, or by reference to extraneous circumstances: but it is submitted that the cases where that has been permitted, are no authority for the plaintiff upon the present occasion, — first, because the nature of the ambiguity was different, — secondly, because, here, the explanation that is given, is not the explanation stated upon the record. [*Maule*, J. The rule is not, I conceive, confined to cases of ambiguity. The admissibility of the fact must depend on something other than ambiguity. If the ambiguity is not apparent on the face of the instrument, you give it in evidence for some other purpose. When the document speaks of some matter of fact existing dehors the instrument, parol evidence must be received.] A patent ambiguity cannot, in general, be explained by evidence: but, where the ambiguity is raised by evidence, there you may explain it. It is to this sort of ambiguity that the cases

cited rather point. Thus, in *Haigh* v. *Brooks*, a doubt was suggested whether the words "you being in advance," meant to import a past or a future consideration. [*Maule*, J. Ambiguity means, that the word, or the instrument, is susceptible of two senses, the one exclusive of the other. In *Haigh* v. *Brooks*, the court thought the guarantee comprehended advances both past and future; there was, therefore, no ambiguity in the sense I have mentioned. The argument there was, —this guarantee is not a binding one, because it applies exclusively to past advances. But the court conceived that it might comprehend future as well as past advances, and that, if there were future advances, the guarantee was a binding one.] In *Butcher* v. *Steuart*, the memorandum was as follows: —"Between *A. B.*, plaintiff, and *C. D.*, defendant. In consideration of your *having released* the above-named defendant from custody, I hereby engage within one month from this date to pay you the sum of 500*l.*, and to hand you over a bond for the residue of the debt, interest, and costs in this action, payable at the expiration of five years, with interest at the rate of 5 *per cent.* in the mean time, half-yearly, &c.: and the court held that the contract, as explained by the facts, was not within the statute of frauds. In *Goldshede* v. *Swan*, *Alderson*, B., says: "If the words had been 'having advanced *yesterday*,' the evidence would not have been admissible, as it would have been a contradiction." Here, taking the antecedent allegations in the declaration as admitted, they shew only *past* advances. [*Maule*, J. The declaration alleges subsequent advances to have been made.] Not in this part of it. [*Maule*, J. Your argument is, that non assumpsit puts all the preceding allegations in issue, and that all must be proved by writing?] So far as is necessary to constitute a consideration. Whatever constitutes the contract, must be proved by writing. No

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contract for future advances is necessarily to be inferred from this instrument: nor any contract for forbearance. In *James* v. *Williams* (*a*), a letter from the defendant to the plaintiff, in these words,—"As you have a claim on my brother for 5*l.* 17*s.*, for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day,"—was held not to satisfy the statute of frauds.

WILDE, C. J. Looking at this guarantee, there is undoubtedly great difficulty in saying that there is any consideration, construing the instrument by its terms, or with reference to the surrounding circumstances. The terms of the guarantee are,—"We, the undersigned, hereby *indemnify* the *National Provincial Bank of England*, to the extent of 1000*l.* advanced, or to be advanced, Mr. *Richard Pinney*, by the *Blandford* branch of that establishment; but the said indemnity to cease when he shall have paid in the said sum of 1000*l.* to the credit of his account." The words "advanced or to be advanced" might fairly admit of the construction that *future* as well as *past* advances were meant: but the facts shew, that, at the time this guarantee was given, there was a debt of 1400*l.* due to the bank from *Richard Pinney;* and there is nothing upon the face of the instrument, and certainly nothing when the state of the account between *Pinney* and the bank is looked at, to shew that the parties contemplated a security for future advances to the extent of 1000*l.* There was at that time a sum exceeding 1000*l.* already advanced; and the guarantee in terms binds the defendants to pay 1000*l.* of it. What is the consideration for that? The argument is, that the word "indemnify" makes the guarantee attach, inasmuch as it imports that the bank incurred some

(*a*) 5 *B. & Ad.* 1108., 3 *N. & M.* 196., 2 *Dowl. P. C.* 481.

future hazard. We can only construe the language used by the parties, according to its ordinary meaning; and, so construing it, the guarantee enures only to secure the bank from loss in respect of moneys advanced or to be advanced. On the face of it, the guarantee does not import that it is to attach upon future advances: future advances are not necessary to make it attach: the full amount of it is absorbed in the debt already due. As to the declaration, the argument urged on the part of the defendants has much weight. It is true, they say, that the allegation that 820*l.* 9*s.* 2*d.* remained due, is not traversed: but they say they did not enter into the guarantee upon the considerations alleged; and this arises upon non assumpsit. And, when we find by the evidence that the debt due was 1400*l.*, it appears to me that the guarantee does not, upon the face of it, disclose any consideration: and, when we look dehors the guarantee, to the facts proved, I think the parties did not necessarily contemplate future advances, and that there is no express or implied contract, either for forbearance in respect of past advances, or for future advances. I therefore think the rule to enter a nonsuit, must be made absolute.

Maule, J. I am of the same opinion. In order to make this declaration good, reading it according to the natural sense of its words, it imports that the defendants promised to guarantee the *National Provincial Bank of England* to the extent of 1000*l.*, in consideration of their making future advances to *Pinney*, that is, provided future advances were made. If the defendants made a promise not upon that consideration, that is put in issue by non assumpsit. The facts are these:—There was a sum of 1400*l.* due from *Pinney* to the bank; and the defendants and the bank came to this agreement of guarantee, with reference to the state of the account, —

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the defendants probably not knowing how the account stood,— by which they agreed to indemnify the bank, to the extent of 1000*l.*, advanced or to be advanced to *Pinney*. It turns out that more than 1000*l.* had already been advanced. If the sum already advanced had been less than 1000*l.*, the guarantee might have admitted of the construction suggested, *viz.* that it impliedly contemplated future advances, inasmuch as it could not otherwise operate to the full extent intended. But, when it appears that the 1000*l.* has already been advanced, and consequently that there is an existing debt to which the guarantee can be at once applied, the meaning of the guarantee is,—We guarantee the existing debt of *Pinney*, to the extent of 1000*l.*, whether future advances are made or not. If the parties had *in terms* said so, there cannot be a doubt that the instrument would not have imported any future advances: and I think they do *in effect* say that. The evidence shews that more than 1000*l.* had already been advanced by the bank to *Pinney*. It is, therefore, the same as if the defendants had said—*Pinney* owes you 1000*l.*: we will pay you, if he does not. The plaintiff, therefore, fails in two views,—first, on the ground suggested by Mr. *Barstow*, *viz.* that, admitting that the declaration shews a good cause of action, the evidence shews that the promise was not made upon the consideration stated, and that arises on non assumpsit,—secondly, that, taking the guarantee and the evidence together, the contract is, to be responsible to the extent of 1000*l.* in all events, whether future advances were made or not. It does not appear to me that the word "indemnify" is to be understood in the sense suggested by Mr. *Wilde*, *viz.* to make the guarantee operate, upon the bank giving time or forbearing to sue *Pinney*. It may be that the defendants undertook, whether time was given or not, to pay the 1000*l.*, if *Pinney* should make default. Such

a promise undoubtedly might be made, and would be binding if made upon a good consideration. But it does not appear upon the face of the instrument, as set out upon this record, construed with reference to the state of accounts between the parties, that there was any consideration for that promise. The promise is a promise to pay the debt of a third person, and not for the consideration stated upon this record, or upon any consideration apparent on the face of the instrument; and therefore the defence was admissible under non assumpsit.

CRESSWELL, J. I also am of opinion that the plaintiff should be nonsuited. Great stress has been laid, on the part of the plaintiff, upon certain preliminary matters stated in the declaration, which it is contended are admitted. But, if those matters are material, and form part of the consideration for the defendants' promise, they are put in issue by the plea of non assumpsit. That being so, the declaration is not proved: it alleges that *Pinney* was, at the time of the giving of the guarantee, indebted to the bank in the sum of 800*l.*, whereas the evidence shewed that 1400*l.* was then due. But, supposing it to be left open, and that the consideration may be collected from the guarantee and the surrounding circumstances, then it appears that there was an account between *Pinney* and the bank, upon which, as the declaration alleges, 800*l.* was due to the latter, and the defendants give their guarantee for 1000*l.*, and, *in consideration of the premises*, the plaintiff and the defendants mutually promise to do all things on their respective parts to be performed. In terms, the bank do not promise to do any thing. If the promise was made in reference to an account of 800*l.* only, the guarantee being for 1000*l.*, it might have been inferred that further advances were

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contemplated: but the evidence negatives that; for, it shews that 1400*l.* was already due. If, therefore, we are to resort to the surrounding circumstances to ascertain the consideration, there is none in law to satisfy the statute.

WILLIAMS, J. For the reasons already given, I am of opinion, construing the guarantee in question with reference to the surrounding circumstances, that there is no sufficient consideration to support it as a binding contract. It is said that the declaration alleges that 800*l.* only was due from *Pinney* to the bank, and that that is admitted; and, taking that as an admitted fact, the guarantee does, it is said, disclose a good consideration, inasmuch as it shews that future advances were contemplated. I am of opinion that that allegation was put in issue by non assumpsit. And, when it appeared at the trial that more than 1000*l.* was due at the time the guarantee was given, the allegation was disproved; for, in no sense could it be said that the defendants' promise was made in consideration of a debt of 800*l.* I therefore agree that there ought in this case to be a nonsuit.

Rule absolute to enter a nonsuit.

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Jan. 31.

Satisfaction of a bill as between a drawer or indorser and an indorsee, whether before or after the bill becomes due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee.

To a count on a bill of exchange for 49*l.*, by indorsees against acceptor, the latter pleaded, that, after the indorsement, and before the commencement of the action, the drawer delivered to the plaintiffs, and the plaintiffs accepted, goods of the value of 50*l.*, in satisfaction and discharge of the bill, and of all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the bill, had always held the same against the will and consent of the drawer, and so still held the same; and that the plaintiffs had commenced the action, and prosecuted the same, against, and in opposition to, the will and consent of the drawer: —

Held, after verdict for the defendant, that the plea was no bar to the plaintiffs' right to recover against the defendant on the bill.

ASSUMPSIT on a bill of exchange, by indorsees against acceptor.

The declaration charged the defendant as the acceptor of a bill for 49*l.*, drawn by Messrs. *W. & C. Cook*, payable to order, at three months after date, and indorsed by *W. & C. Cook* to the plaintiffs.

The fourth plea stated, that, after the indorsement of the bill to the plaintiffs, and before the commencement of the action, *W. & C. Cook*, the drawers of the bill, had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods of great value, to wit, of the value of 50*l.*, in full satisfaction and discharge of the said bill of exchange, and of all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange, hitherto, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers.

To this plea, the plaintiffs replied *de injuriâ*.

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At the trial, before *Maule*, J., at the second sitting in *London*, in *Easter* term, 1848, in support of this plea the defendant called *W. Cook*, one of the drawers. He proved that the plaintiffs' traveller called at his warehouse, and looked out the goods, which were sent to the plaintiffs in satisfaction of the bill. He also admitted that the amount of the bill had been paid to him, *Cook*, by the defendant.

On the part of the plaintiffs, it was insisted that this evidence did not sustain the plea, inasmuch as it did not shew that the goods were delivered to or received by the plaintiffs in satisfaction of their claim against the defendant as acceptor.

A verdict having been found for the defendant upon the issue on the fourth plea, and for the plaintiffs on all the other issues,

Byles, Serjt., in *Easter* term, 1848, obtained a rule nisi to enter the verdict upon the fourth issue, for the plaintiffs, or for judgment *non obstante veredicto*. The learned serjeant submitted that the fourth plea would admit of two constructions,—that it might mean that the goods were delivered and accepted in satisfaction and discharge of all damages and causes of action which the indorsees had against *Cook*, the party delivering them,—or it might mean, in satisfaction and discharge of the bill and of all damages and causes of action thereon against any party to it; that, if the plea was to be read according to the first of these constructions (which, it was suggested, it must be), then it was clearly a bad plea; and that, if it was to be taken in the latter sense, it would raise this question,—whether a payment or satisfaction of a bill by the drawer, the acceptor being no party to such satisfaction, discharges the right of action of the holder against the acceptor.

Against this rule cause was shewn by *Channell*, Serjt., in *Trinity* term last, and *Byles*, Serjt., and *Prentice*, were heard in support of it. The arguments and the authorities cited are so fully commented upon in the judgment, that it has been thought unnecessary to report them.

WILDE, C. J. The first question which arises upon this motion, is, whether the verdict upon the issue joined upon the fourth plea, has been properly found for the defendant. It is said that the fourth plea is equivocal in its language. It states, that, after the indorsement of the bill to the plaintiffs, and before the commencement of the action, the drawers had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods, of the value of 50*l.*, in full satisfaction and discharge of the bill, *and all damages and causes of action in respect thereof;* and that the plaintiffs, from the time of the said satisfaction of the bill, hitherto, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers. The question is, whether this plea,—whether it is a valid and sufficient plea, or not, —means to allege that the drawers gave to the plaintiffs, at their request, and that the latter accepted, the goods in the plea mentioned, in satisfaction of the bill, and of all damages and causes of action in respect thereof as against any of the parties thereto; or, in other words, whether it means that the goods were delivered and accepted in extinguishment of all right of action of the plaintiffs upon the bill. It is true that the goods might have been given, not in satisfaction and discharge of the bill generally, but in discharge of the liability of the *Cooks*, and in respect of the causes of

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action by the plaintiffs against *them.* I do not think that that is the fair meaning of the plea; but I think it means, that the goods were delivered in satisfaction and discharge of all damages and causes of action in respect of the bill, whether against the *Cooks,* or against any other parties to it. So understanding the plea, was the evidence such as to warrant the finding of the jury? Look at the situation of the drawers. Suppose the drawer of an accommodation bill pays the amount to the holder: what is the reasonable intendment of the payment? If he does not make the payment in satisfaction and discharge of the holder's claim against every party on the bill, what good does he get by changing the plaintiff against him? The drawer of an accommodation bill is, in truth, the only party ultimately liable upon the bill. A person standing in that position, when he pays the bill, must be understood to make the payment in satisfaction of all claims against any one upon the bill. It appears that this bill was drawn for value. The drawers received from the acceptor the full amount of the money. It then became their duty to adjust and extinguish all remedies of the holders against any party to the bill. Having a general account with the plaintiffs, the items on the debit side of which, including the bill in question, amounted to 81*l.*, and those on the credit side to 31*l.*, the drawers deliver to the plaintiffs goods to the amount of 50*l.* Suppose, instead of goods, they had given the plaintiffs 50*l.* in money, the necessary intendment would undoubtedly be that it was a payment in satisfaction and discharge. The goods having been delivered as money, and so treated by all parties, I see no difference between a payment in money and a payment in goods. The fair meaning of the plea, I think, is, that the goods were delivered in satisfaction and discharge of the liability of every party to the bill: and the evidence warranted the jury in finding for the defendant.

Whether or not enough is disclosed on the face of the plea, to make it enure as a defence, is a matter of more difficulty; and upon that, and the authorities cited, we will take time for deliberation.

COLTMAN, J. I also am of opinion that this plea is large enough to import a payment (in goods) in satisfaction and discharge of the liability of all the parties to the bill. Assuming that it can so enure, it ought to be so construed as to make it a good defence, — the plaintiffs having pleaded over. In that view, it seems to me that the plea is sufficient. Being so understood, was there evidence to warrant the finding for the defendant? It was clearly the duty of the holders, under the circumstances, to discharge the liability of the defendant. I think there was abundant evidence to warrant the jury in finding that the goods were delivered to and accepted by the plaintiffs in satisfaction and discharge of the liability of every party to the bill.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

The declaration in this case charges the defendant as the acceptor of a bill of exchange for 49*l.*, drawn by *W. & C. Cook*, payable to their order, at three months after date, and indorsed by the drawers to the plaintiffs; and, among other pleas, not material to be noticed on the present occasion, the defendant, by his fourth plea, alleged, that, after the indorsement of the bill of exchange to the plaintiffs, and before the commencement of the action, the drawers of the bill had delivered to the plaintiffs, and the plaintiffs had accepted, divers goods, of the value of 50*l.*, in full satisfaction and discharge of the said bill of exchange, and all damages

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and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange, to the time of the pleading of the plea, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still prosecuted the same, against, and in opposition to, the will and consent of the said drawers.

To this plea, the plaintiffs replied *de injuriâ;* and a verdict was found for the defendant, upon the trial of the issue joined on that plea.

A rule has since been obtained by the plaintiffs, calling upon the defendant to shew cause why judgment should not be entered for them *non obstante veredicto,* in respect of the insufficiency of that plea.

Upon this record, the bill of exchange must be taken to have been accepted upon a good consideration. The interest of the acceptor, therefore, is not liable to be affected by the state of accounts, or equities, between any other parties connected with the bill: and the only question in which he has any interest, is, whether the party seeking to enforce payment by him, is the legal owner of the bill, and whether recovery by, and payment to, such party, will enure as a satisfaction and absolute discharge of his liability upon the bill. By the indorsement averred in this declaration, and not traversed, the plaintiffs became the legal owners of the bill; and the recovery of the amount thereof will have the effect of discharging the defendant from all future liability. The plea does not allege whether such satisfaction was given and accepted before or after the bill became due; nor is it averred to have been at the request, or for or on behalf, of the defendant, or in satisfaction of his liability upon the bill, or of the cause of action of the plaintiffs against him: nor does it, in any way, connect the defendant with the transaction, or

shew any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill, and the defendant was the acceptor.

As the plea did not allege that the satisfaction was made at the request, or for or on behalf, of the defendant, or in respect of the cause of action stated in the declaration, the defendant was not required to give any evidence to such effect, to entitle him to the verdict he obtained: and therefore the verdict will not warrant an intendment of any such facts (*a*), or of any other fact tending to extend the import of the plea as stated upon the record: and the question raised by the plea, according to its terms, is, whether satisfaction of a bill as between a drawer or indorser, and an indorsee, made before or after the bill becomes due, enures as a satisfaction on behalf of the acceptor, and operates to discharge *him* from liability to the indorsee.

In support of the rule, it was contended, that the plea did not shew sufficient matter to bar the plaintiffs from judgment, because the satisfaction therein set forth, was not, as before stated, averred to have been made at the request, or for or on behalf, of the defendant, or for or in respect of the cause of action declared upon; and that no legal privity was shewn between the parties who made satisfaction, and the defendant, and therefore the satisfaction made, did not enure as a discharge of the defendant; and that the satisfaction was made by parties who were under a personal liability upon the bill declared on, either absolute or contingent; and that the plea imports that the satisfaction made by them, referred, and was limited, to their own personal liability, and was not shewn to have extended beyond; and that the satisfaction to the indorsee of a

(a) *Vide* 1 *Mann. & Ryl.* 285, n.; 2 *Nev. & M.* 442.; 2 *M. & G.* 422.; 3 *M. & G.* 697.

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bill, made by the drawer or indorser, did not, as a legal consequence, enure as a satisfaction of the bill *quoad* the acceptor, or any other person, other than those who, if called upon by the indorsee to pay the bill, would have a remedy over against the party who made the satisfaction, and thereby subjecting such party to a liability to make double satisfaction.

It was also insisted that the plea did not shew any legal privity between the drawers who made the satisfaction, and the defendant; and that the plea, therefore, at most, amounted to a plea of satisfaction made by a stranger, and, as such, could not be pleaded in bar against the plaintiffs.

On the part of the defendant, it was contended, upon shewing cause, that, upon principle and authority, satisfaction made by the drawer of a bill, to an indorsee, enured by law as a satisfaction by or on behalf of the acceptor, and might therefore be pleaded in bar to any action afterwards brought by the indorsee against the acceptor; and that the drawer and acceptor's being parties to the same bill, was a sufficient legal privity to make satisfaction by the drawer enure as a discharge of the acceptor, as against the indorsee who received the satisfaction: and, further, it was contended that it was competent to any one to plead in bar satisfaction, even by a stranger, for the cause of action sued upon, which had been accepted by the plaintiffs.

The case was very elaborately argued, and many authorities were referred to on both sides. The court has examined all the authorities referred to, and considered the case, and, in the result, is of opinion that the plea, as proved and sustained by the verdict, does not shew sufficient matter to bar the plaintiffs, and that the rule to enter judgment for the plaintiffs *non obstante veredicto*, must be made absolute.

In considering the case upon principle, it will be

proper to advert to the legal relation in which the respective parties stand towards each other, upon the effect of whose acts and rights the determination of the rule must depend. It is to be observed that the drawers and acceptor are parties to the same instrument, as contractors with each other, and not as joint-contractors with a third person; and that, by the indorsement of the bill, independent and different contracts arise, on the respective parts of the drawers and the acceptor, with the indorsees. The acceptor is primarily and absolutely liable to pay the bill, according to its tenor. The drawers are liable only upon the contingencies of the acceptor's or drawee's making default, and of the holder's performing certain conditions precedent, such as, presenting the bill according to its tenor, and giving due notice of the failure of the acceptor, or drawee, to pay, upon a proper presentment.

The contracts created by the bill, as regards the drawers and the acceptor, are therefore essentially distinct; and there seems to be no legal ground why the indorsee of a bill may not accept satisfaction of the contingent or absolute liability of the drawer, without, by so doing, discharging the acceptor.

The competency of an acceptor to pay, may be doubtful; and no valid reason is apparent why the indorsee may not release and discharge the drawer, or an indorser, by competent legal means, either upon consideration more or less valuable, or without, and retain his remedies against the acceptor,—unless in the case of an accommodation bill, in which case, the acceptor is a mere surety, as between him and the drawer, and entitled to recover against the drawer whatever he may be compelled to pay in discharge of his suretyship. In such a case, where an indorsee who has received satisfaction from the drawer, with notice, sues the acceptor, a different question may arise: but, upon the record in

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this case, the bill must be taken to have been a bill accepted for value, and which the acceptor therefore ought, in all events, to pay; and, having received value, it is difficult to discover any valid reason why he should be discharged from his liability to make the payment, which, for value, he has contracted to make, by reason of any arrangements between others, to which he is no party, in which he is not shewn to have interfered, or his rights and liabilities are not shewn to have been in the contemplation of the parties to any such arrangements, and by which his interests are not in any respect compromised or affected.

By the indorsement of a bill, the indorsee becomes the legal owner of it; and satisfaction of the contingent or absolute liability of the drawer, or of an indorser, does not necessarily vacate or avoid the effect of the indorsement, or destroy the title of the indorsee to the ownership of the bill. Payment of the bill by a drawer, or an indorser, may or may not, according to circumstances, entitle the party paying, to the possession of the bill: there may be a satisfaction of the bill between such parties, which may not entitle them to the possession of the bill. The plea in question has no statement to the effect that the drawers, by reason of the satisfaction made, were entitled to have the bill delivered up: it only states that the plaintiffs hold the bill against the will and consent of the drawers,—which is by no means equivalent to a statement that they were entitled to have the bill delivered to them. The plea does not aver that the value of the goods delivered in satisfaction, was equal to the amount of the bill; and it is consistent with the language of the plea, that the drawers may have made satisfaction of the bill, so far as regarded their liability, by any small composition, leaving the plaintiffs with all their remedies in point of law against the acceptor and other

parties to the bill; and yet the drawers may afterwards have dissented from the plaintiffs' retaining the bill, or suing the acceptor upon it.

The terms of the plea do not import that the satisfaction was made upon any contract or condition, either that the bill should be delivered up, or be deemed to be satisfied as between the plaintiffs and the acceptor: and, when the nature of the relation in which the respective parties stand towards each other, is considered, no principle is apparent upon which, as a consequence in law, the satisfaction of a bill as between the indorsee and the drawer, should operate as a satisfaction and discharge in favour of the acceptor.

Supposing the effect of the plea to be, that the plaintiffs are suing as trustees for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust, nor, consequently, whether the trustee is enforcing his legal rights against a third person with or against the consent of his *cestui que trust*. And we are of opinion that the defendant has not established any legal principle which will entitle him to judgment upon this plea.

But it has, on his behalf, been contended, that the plea ought to be supported, and judgment given for the defendant, upon authority.

We have reviewed the authorities relied upon, and they do not appear to us to entitle the defendant to judgment.

Remarks on *Bacon* v. *Searles*.

The case of *Bacon* v. *Searles* (*a*) was cited; and it must be admitted, that, in that case, according to the report, it was held that the indorsee of a bill, who had received from the drawer a part of the amount of the bill, was entitled to recover from the acceptor only the

(*a*) 1 *H. Blac.* 88.

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balance; and Lord *Loughborough*, then chief justice, is reported to have said, "that, if the drawer of a bill anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking:" and he adds: "so that, if the acceptor were to pay the bill after notice given to him that the drawer had already paid it, an action would lie for the drawer against the acceptor, to recover back the money so paid." Lord *Loughborough* concludes his judgment by saying, — "Another reason which weighs much with me, is, the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if, after a bill had been taken up by the drawer, the acceptor should be called upon for payment." The report of this case is not satisfactory. Lord *Loughborough* is made to say, that, if the drawer anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking: and yet he is said to have added, "that, if the acceptor were to pay the bill, after notice given to him that the drawer had already paid it, an action would lie for the drawer to recover it back again;" which, as applied to the facts of the case, is not very intelligible. If it was meant, that, supposing the drawer should sue the acceptor upon the bill, the acceptor could not plead in bar the payment to an indorsee, after notice that the drawer had paid it, it is intelligible, but not, upon the facts stated, very satisfactory. The point in judgment, was, whether an indorsee, after having received payment of part of the bill from the drawer, was entitled, in an action against the acceptor, to recover the whole amount of the bill, or only the balance of the bill remaining unpaid; and it was held that the balance only was recoverable. As a decision upon that point, it has been over-ruled. The observations made by the judges, render it uncertain whether it was the case of a bill for

value, or an accommodation bill: but those observations are of doubtful accuracy, in either view of the case. If it was a bill for value, the remark is not correct, that payment by the drawer discharged the acceptor from his promise; because the acceptor in such a case would be clearly liable to the drawer, who, by his payment to the indorsee, would become entitled to sue the acceptor upon the bill: and, if it was the case of an accommodation bill, the remark is unintelligible, that, if the acceptor, who would be surety only for the drawer, was to pay the bill after notice, the drawer, who was the principal debtor, might recover the money back again from the acceptor, his surety.

It may be that what was intended to be said, was, that such a payment by the acceptor would make the indorsee a trustee for the drawer, and liable to refund to him what should be paid by the acceptor: but it is by no means clear that this was intended to be said, because the remarks refer to the acceptor's liability to refund, in terms, and speak of a payment by the acceptor, after notice of payment by the drawer,—which would be quite immaterial, upon the question whether the indorsee would become a trustee for the drawer, in regard to the sum received from the acceptor. The doubt whether it was the case of a bill for value, or an accommodation bill, is increased by the observations of Mr. Justice *Wilson*, who referred to a case of *Beck* v. *Robley*. (*a*)

Considering this case of *Bacon* v. *Searles* with refer-

(*a*) Note to *Bacon* v. *Searles*, 1 *H. Blac.* 89, n.; *Bayley on Bills*, 125. In *Beck* v. *Robley*, *A.* drew a bill on the defendant, payable to *B.* or order. The bill not being paid at maturity, *B.* returned it to *A.* who took it up, *B.*'s indorsement remaining thereon. *A.* gave the bill as a security to the plaintiff, informing him of the circumstances. It was held that the bill was extinguished by being taken up by the drawer, and could not be again negotiated.

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ence to the point decided,—that part of a bill (accepted for value) being paid by a drawer or indorser, disentitles the indorsee to recover from the acceptor more than the balance remaining unpaid,—it has been overruled by modern decisions, and is not now to be deemed to be law: and, if it is to be considered as the case of an accommodation bill, it is inapplicable to the questions which arise upon this plea.

Remarks on *Beck* v. *Robley*.

Mr. Justice *Wilson* referred to the case of *Beck* v. *Robley*, reported in a note to *Bacon* v. *Searles*, and which, it would seem from the statements in the report, was the case of an accommodation bill. The facts were these:—*Brown* drew the bill upon *Robley*, payable to *Hodson*, and gave the bill to *Hodson* as security for an advance made to him by *Hodson*. *Robley* accepted the bill, and *Brown*, the drawer, took it up when due, in *Hodson*'s hands, and received back the bill with *Hodson*'s indorsement upon it. *Brown, after the bill had become due*, paid it to *Beck*, who brought the action against *Robley*. The action was held not to be maintainable; and correctly so; as, after the bill had become due, the drawer could only negociate it subject to such equities as existed against him; and, it being an accommodation bill, *Brown*, the drawer, could not have sued the acceptor, and so neither could a subsequent holder claiming under him after the bill had become due. The decision against the plaintiff, therefore, would have been correct, irrespectively of another fact relied upon in that case, *viz.* that *Beck*, the plaintiff, was compelled to claim through the indorsement of *Hodson*, the payee: and the court was confirmed in its decision against the plaintiff, upon the ground, that, if effect were given to *Hodson*'s indorsement under the circumstances, *Hodson* himself might be rendered liable,—a result which ought not to occur. It is unnecessary to consider the correctness of that opinion: but both the cases of *Bacon* v. *Searles*

and *Beck* v. *Robley* would be well decided, if the bills upon which those actions were brought were accommodation bills; and *Beck* v. *Robley*, in that event, might be considered as an authority for the determination of *Bacon* v. *Searles*.

Purssord v. *Peek*.

Upon *Bacon* v. *Searles* being cited as an authority, in *Purssord* v. *Peek* (*a*), as deciding that a payment by the drawer of a bill discharged the acceptor *pro tanto*, Lord *Abinger*, C. B., said, that, "if that were the principle of that case, it might be a question whether, if it were now considered, it would not be over-ruled."

Johnson v. *Kennion*.

The case of *Johnson* v. *Kennion* (*b*) was cited as an authority, on the part of the plaintiffs, that the contract created by the bill, could not be severed and made the ground of two actions, and that the holder must bring an action for the whole, and be considered trustee for the drawer, for so much as he had paid. Mr. Justice *Wilson* is said to have referred to the case of *Beck* v. *Robley*, as contrary to that position: but it is not obvious that such is the effect of *Beck* v. *Robley*. *Johnson* v. *Kennion*, however, distinctly decided that the indorsee was entitled to recover the whole amount of the bill, although he had received a part from the drawer: and, unless *Bacon* v. *Searles* and *Beck* v. *Robley* were distinguishable, upon the ground of the actions being upon accommodation bills, it does not appear how the authority of *Johnson* v. *Kennion* was avoided.

Assuming, however, *Bacon* v. *Searles* and *Beck* v. *Robley* to be authorities that the acceptor of a bill for value, is discharged altogether, or *pro tanto*, by payments made by a drawer or indorser, to an indorsee, who afterwards sues the acceptor, they cannot be considered as binding authorities; and they are inconsistent

(*a*) 9 *M. & W.* 196. (*b*) 2 *Wils.* 262.

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Callow v. *Lawrence.*

Hubbard v. *Jackson.*

Pierson v. *Dunlop.*

with *Callow* v. *Lawrence* (*a*), where the continued liability of the acceptor is distinctly determined; and *Hubbard* v. *Jackson* (*b*) is a decision to the same effect, following the authority of *Callow* v. *Lawrence:* and, in both cases, *Beck* v. *Robley* was treated as a decision upon the ground that the plaintiff could not claim through *Hodson*'s indorsement.

Pierson v. *Dunlop* (*c*) was an action against the acceptor of a bill for 300*l.* The drawer having paid 180*l.*, the plaintiffs took a verdict for the whole amount, which the court compelled them to reduce, at their own cost. There can be little doubt that this also was the case of an accommodation bill; as it appears, that, after the verdict, a bill in equity was filed to obtain a discovery of the payment, and reduction of the verdict; and, if the *cestui que trust* of the plaintiffs was not entitled to receive the 180*l.*, the court, in its equitable jurisdiction, could not have permitted their trustee to recover it. The case would resolve itself into that of a payment by the principal debtor, in ease of the surety.

Walwyn v. *St. Quintin.*

In the case of *Walwyn* v. *St. Quintin* (*d*), the plaintiffs were required to give the acceptor credit for the amount of the payment made by the drawer, the court holding the bill to be an accommodation bill.

The several other cases which were cited on the part of the defendant, are no authorities for the purpose for which they were cited: indeed, they are rather against him.

Purssord v. *Peek.*

In *Purssord* v. *Peek* (*e*), the court held that the plea was bad for duplicity: it alleged that the defendant, the acceptor of a bill of exchange, had accepted it

(*a*) 3 *M. & Selw.* 95.
(*b*) 1 *M. & P.* 11., *S. C.* 4 *Bingh.* 390., 3 *Carr. & P.* 134.
(*c*) 2 *Cowp.* 571.
(*d*) 1 *B. & P.* 652.
(*e*) 9 *M. & W.* 196.

for the accommodation of the drawer, and that the drawer had satisfied the bill; and it further stated, that, at the time of the action, the plaintiff was a holder of the bill without consideration or value.

Reynolds v. *Blackburn*

Reynolds v. *Blackburn* (a) was an action by indorsee against the acceptor of an accommodation bill; and the plea alleged, by way of discharge, notice to the plaintiff, and that, after such notice, he received other bills from the drawer, and agreed to give time upon the bill sued upon, until such other bills should become due, and be dishonored: the plea proceeded to state that the bills were so delivered and accepted in payment of the bills in the declaration, and that the agreement was made without the defendant's knowledge, privity, or assent. The plaintiff replied *de injuriâ;* to which the defendant demurred, for duplicity. The court said the replication was as good as the plea, which had set up two defences, and gave judgment for the plaintiff.

Sard v. *Rhodes*

Sard v. *Rhodes* (b) was also an action against the acceptor of an accommodation bill, in which the defendant pleaded, that the bill was an accommodation bill, and that the drawer had given another note, for a larger sum, in payment and satisfaction, which the plaintiff had accepted. The plaintiff replied, that the note so given was dishonoured. The defendant demurred, and the replication was held ill, and the plea good.

In each of the three last-mentioned cases, the pleas alleged the bills to be accommodation bills, — shewing what is now understood to be the law in regard to payments or arrangements between subsequent parties to the bill; which can have little application to the present case, which is that of a bill accepted for value.

(a) 7 *Ad. & E.* 161., 2 *N. & P.* 137.

(b) 1 *M. & W.* 153., *Tyrwh. & Gr.* 298., 4 *Dowl. P. C.* 743., 1 *Gale,* 376.

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Field v. *Carr.*

Field v. *Carr* (*a*) is also inapplicable: it was an action by bankers, as indorsees, against the acceptor; the drawer having delivered the bills to the plaintiffs, his bankers, as security, and the acceptor having paid the amount of the bills to the drawer without obtaining the bills, which remained in the hands of the bankers: and the point really in contest, was, whether, upon the application of the rule in *Clayton*'s case (*b*), the bills, as against the bankers, the plaintiffs, were to be considered as satisfied: the court held that they ought to be so considered.

Thomas v. *Fenton.*

The case of *Thomas* v. *Fenton* (*c*) was argued before Mr. Justice *Coleridge.* It was an action against the drawer of an accommodation bill; and it appeared, that, the bill being dishonored, an action had been brought by one *Clark*, against the acceptor, and that the plaintiff, as a volunteer, — being the son-in-law of the acceptor, — had paid the debt and costs, and obtained the bill from the then plaintiff, with the defendant's indorsement upon it, and brought the present action upon the bill. One question was, whether the bill ought to be deemed an accommodation bill. A further question was, whether there was a sufficient dispensation of giving notice of the dishonor; also, whether the payment which had been made, supported the plea of payment by the acceptor. An objection was also made, that the bill required a new stamp. Mr. Justice *Coleridge* held that the bill did not require a new stamp, inasmuch as it had never been paid, — payment meaning payment by the party ultimately liable, and the payment in question not being such a payment. He also held, that sufficient excuse was alleged for not giving notice, the bill being an accommodation bill. And the learned judge dis-

(*a*) 5 *Bingh.* 13., 2 *M.* & *P.* 46.

(*b*) 1 *Meriv.* 572. 604.

(*c*) 5 *D.* & *L.* 28.

tinctly intimates that payment by an intermediate party is no discharge to the acceptor.

Hemming v. *Brook* (a) was an action against the acceptor, where the drawer had paid part of the bill. The cause was undefended: the counsel for the plaintiff was instructed as to the payment, but altogether uninformed whether the bill was an accommodation bill, and of every other circumstance respecting it. The judge, therefore, recommended that a verdict should be taken, giving credit for the payment.

Hemming v. *Brook.*

Pownal v. *Ferrand* (b) determined that the indorser of a bill, paying a part of the bill to the holder, might recover from the acceptor the amount so paid, as money paid to his use. It is to be observed, that the plaintiff in that case had paid 40*l.* on account of a bill indorsed by him, and which had been accepted by the defendant, for 350*l.* After the payment of 40*l.* by the plaintiff, the holder of the bill brought an action upon the bill against the defendant, the acceptor, and recovered a verdict for the whole amount of the bill, 350*l.*, but afterwards levied the balance only due to him, giving credit for the 40*l.* which the plaintiff had paid: and, in consequence of the defendant's having thus derived the benefit of the plaintiff's payment, the action was brought by the plaintiff, to recover the amount as money paid to the defendant's use; when it was contended that the plaintiff could only sue upon the bill: but the court held, that there might be a difficulty in suing upon the bill, by reason of a judgment having been recovered against him for the whole amount of the bill, by a former holder; and that, the defendant having had the benefit of the payment, an action for money paid might be maintained.

Pownal v. *Ferrand.*

(a) *Carr. & Marsh.* 57.

(b) 6 *B. & C.* 439., 9 *D. & R.* 603.

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Lane v. *Ridley* (*a*) was to the same effect as *Reynold* v. *Blackburn*, *Purssord* v. *Peek*, and *Pascoe* v. *Vyvyan* (*b*), *viz.* that, where the plea is double, it is no objection that the replication is also double.

Lane v. *Ridley.*

Pascoe v. *Vyvyan.*

Reference has thus been made to the several cases which were cited, with some regret, as the only result is, to shew that they are inapplicable to this case, and afford no assistance to the court in determining the question raised upon the record; and, in fact, no determination has been brought to the notice of the court, shewing this plea to be good, although there are some expressions in some of the older cases which have that aspect, but which *dicta* were not necessary to the decision of the cases in which they are to be found; and such *dicta* are not consistent with subsequent determinations. It certainly has been no rare practice for indorsees of bills of exchange and promissory notes, to take verdicts for the full amount of the instruments, after having received partial payments from other parties to such instruments: and there are reported authorities in distinct affirmation of the right so exercised by the plaintiffs, — *Callow* v. *Lawrence*, before mentioned, *Reid* v. *Furnival* (*c*), and numerous cases in bankruptcy, where proof is admitted against the acceptors of bills and makers of notes, for the full amount, notwithstanding partial payments made by other parties. In *Ex parte De Tastet, in re Corson* (*d*), *Warren* and *Bruce* were held entitled to prove against the estate of the bankrupts, who were the acceptors, for 1364*l.*, and take dividends for that amount, notwithstanding they had received payments from other parties, reducing their demand to 420*l.*

Reid v. *Furnival.*

De Tastet, ex parte.

We think, therefore, that this plea is contrary to principle, and that it has no authority to support it.

(*a*) 10 *Q. B.* 479.
(*b*) 1 *Dowl. N. S.* 939.
(*c*) 1 *C. & M.* 538.
(*d*) 1 *Rose*, 10.

The plaintiffs stand upon the record the legal owners of the bill, and the defendant as having failed to perform his contract, without any legal excuse for the breach. The defendant was the party primarily liable, and, by his plea, he sets up, by way of discharge, satisfaction by one not in privity with him in relation to such satisfaction, and which we think did not enure to his discharge; and we think the plea, therefore, bad, and the plaintiffs entitled to judgment, as prayed.

Upon the argument of this case, we were much pressed with the objection to the plea upon the ground that it was, in effect, a plea of satisfaction by a stranger; which, it was said, was bad in law. The opinion of the court upon the other objections to the plea, being in favour of the plaintiffs, it has become unnecessary to decide upon the validity of this particular objection. But, as the court has been called upon to consider the law in relation to this subject, it may be a convenience to the profession to mention the authorities which are to be found upon the subject.

It may appear that the law is not perfectly settled. The authorities of the text-books are generally to be found under the title of "*Accord and Satisfaction;*" and most, if not all, of such text-books, refer to accord and satisfaction by and between the parties to the cause of action, and but very few authorities are to be found upon the subject of satisfaction made by a stranger. Notwithstanding the passages referred to in the text-books, there is very early authority to the effect that satisfaction made by a stranger to a party having a cause of action, and adopted by the party liable to the action, may be used as a good bar to an action for such cause. It is stated in *Fitzherbert's* Abridgment (*a*), that, "If a stranger does trespass to me, and one of his relations,

(*a*) Title *Barre*, pl. 166. (*Hilary*, 36 *H.* 6.) And see *Co. Litt.* 206. b.

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or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" A very diligent search has not found any old authority inconsistent with the case in *Fitzherbert.* In several cases obligations given by strangers to parties having a cause of action, have been held to be no bar to an action between the parties to such a cause: but it will be found that all those cases were decided upon the ground that the obligation, so given, was collateral, and not by way of satisfaction, or in extinguishment or merger. In connexion with this branch of the law, this consideration will always be found material.

In *Fitzherbert*'s Abridgment, title *Dette*, pl. 83, it is said: "In debt on contract, it is no plea to say that the plaintiff has a bond of a stranger, for the same duty; but, to say, that he has a bond of the defendant himself for the same duty, is a good plea." (*a*) So, in *F. N. B.* 121 M., it is said — "If a man contract to pay money for a thing which he hath bought, if he make a bond for the money, the contract is discharged, and an action of debt will not lie upon the contract." "But (*b*) it is otherwise if a stranger makes an obligation for the same debt." 5 *Viner*'s Abridgment, 515, is to the same effect; also *Brooke*'s Abridgment, title *Contract*, pl. 29. In

(*a*) *Per Shard.* (*Shardelow*, J.), 29 *H.* 8., *Bro. Contract*, pl. 29., — "If a man be indebted to me by contract, and afterwards makes to me a bond of the same debt, the debt is thereby determined; for, in debt upon the contract, it is a good plea, that he has a bond of the same debt. But, if a stranger makes to me a bond for the same debt, still the contract remains; because it is by another person; and both are now debtors."

(*b*) Lord *Hale*'s note, *ib.*, citing *Fitz. Abr.*, *H.* 35 *E.* 3, *Dette*, pl. 83.; and referring to 11 *H.* 4, fo. 79. (*Rauf's Baker's* case, *T.* 11 *H.* 4, fo. 79, pl. 21.); 13 *H.* 4, fo. 1. (*M.* 13 *H.* 4, fo. 1, pl. 3.); 10 *H.* 7, fo. 21. (*P.* 10 *H.* 7, fo. 21, pl. 16).

Pudsey's case, cited in *Hooper's* case (*a*), it was held, that a bond given by a stranger, pursuant to a stipulation in the original contract, will be a bar; but, otherwise, upon a subsequent contract." The same point was decided in the principal case of *Hooper*.

Grymes v. *Blofield.*

Some doubt has arisen upon the point of satisfaction by a stranger, from the case of *Grymes* v. *Blofield.* (*b*) The report in *Cro. Eliz.* states it to have been an action on an obligation for 20*l.* The defendant pleaded that *J. S.* had surrendered a copyhold tenement, in satisfaction, which the plaintiff accepted. The plaintiff demurred to the plea; and it is said that *Popham* and *Gawdy*, J J., held it to be no plea, for *J. S.* was a mere stranger, and not privy to the condition, and therefore satisfaction by him was not good; and that afterwards, in *Easter* term, 31 *Eliz.*, *Popham* and *Clench* adjudged for the plaintiff, in the absence of the rest of the justices. In *Comyns's* Digest, the case is stated to the same effect. But, from the report of the same case in *Rolle's* Abridgment, it is to be inferred that judgment was given for the defendant.

Edgecombe v. *Rodd.*

In the case of *Edgcombe* v. *Rodd* (*c*), — which was an action for trespass and false imprisonment, to which satisfaction by another party was pleaded (upon the authority of *Grymes* v. *Blofield*), accrediting the report in *Cro. Eliz.*, because cited in *Comyns* without disapprobation, — the court seems to have thought the plea bad, as setting up satisfaction by a stranger. In *Edgcombe* v. *Rodd*, however, the plea was held to be bad upon another substantial ground, upon which the judgment rather seems to have been founded.

(*a*) 2 *Leonard*, 110.

(*b*) Reported in *Cro. Eliz.* 541., and in *Rolle's Abridgment*, 471. (translated, 5 *Vin. Abr.* 296. *Condition* (F. *d.*), pl. 1., and in *Comyns's Digest*, *Accord* (A. 2.), 5.) And see *M.* 28 *H.* 6, fo. 4, pl. 21.

(*c*) 5 *East*, 294.

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The rolls of the court have been searched, to ascertain the real state of the case of *Grymes* v. *Blofield:* but without much satisfaction being obtained. There are three rolls, importing three distinct actions upon three obligations for 20*l.*; and, in each case, a plea of satisfaction by *J. S.* by the surrender of a copyhold. The rolls are of *Trinity* term, 36 *Eliz.*, *B. R.* No. 844, No. 845, No. 846. On the roll 844, the plea was demurred to, and a joinder in demurrer, with a *dies datus* to *Michaelmas* term; and there is no further entry upon that roll. Upon the roll 845, the pleadings are to the same effect, with a form of a *dies datus* in blank, and no further entry upon that roll. Upon the roll 846, there is a declaration and plea to the same effect as in the other rolls, with a replication traversing the surrender of the copyhold in satisfaction, and the acceptance. Issue was joined, and the cause tried, and a verdict found for the plaintiff, which was entered upon the *postea.* There is then an entry that a new trial was granted, upon the ground that the *venire* had issued to a wrong county: and a new *venire* awarded; and there the entry upon that roll ceases.

Upon further inquiry being made, there has been found a report of the case in the MSS. reports in the British Museum, in the *Hargrave* MSS. No. 7. Vol. 2., p. 251, reports by *Humphry Were.* The case is reported, in substance, as in *Cro. Eliz.*, referring to the roll in B. R. (*Trinity* term, 36 *Eliz.*) 844; and it states that *Fenner*, J., doubted of the opinion of *Popham* and *Gawdy*, by reason of the acceptance of the plaintiff, and cites the 36 *H.* 6. title *Barre* (*a*), which is the case referred to in *Fitzherbert*'s Abridgment (*b*): and it after-

(*a*) 36 *H.* 6., *Fitz. Abr. Barre*, pl. 166.

(*b*) The reference by *Fenner*, J., is in the form at that time and long since used in citing *Fitz. Abr.*

wards states, that, upon the case being moved again, *Clench* and *Fenner* agreed that the plea was a good bar; and that *Gawdy* said the case of *Trespass*, 36 *H.* 6. (*a*), was good law: and the report then states, that, in *Easter* term, 39 *Eliz.*, the plaintiff had judgment to recover,—*Popham* and *Clench* only being in court.

There is another report of the same case in the *Hargrave* MSS., No. 50., in a book said to have been given, in 1618, by *Arthur Turnour* to Serjeant *Calthorpe*, in exchange for other books: but that report does not state any judgment to have been given.

In the *Lansdowne* MSS. in the British Museum, No. 1104, fn. 152. *b.*—being a report of cases from the 6th to the 41st year of *Elizabeth*, the same case is reported, stating a judgment for the plaintiff; and the report being precisely to the same effect as in the *Hargrave* MSS.

It appears that *Humphry Were* was, at a somewhat later period, a reader to the *Inner Temple*, and afterwards a serjeant.

It seems probable that the report in *Croke*, stating the judgment to have been given for the plaintiff, is correct: although it never is supposed to be the authority of the 39 *E.* [illegible] which seems contrary to the decision, and to have been reversed in [illegible]

In *Turner* v. *Wal*[illegible] the question as to the effect of [illegible] by a stranger, [illegible] and the court seemed to [illegible] the decision of *Gregory* v. *Sayland* as correct: but [illegible] the [illegible] question in that case was a [illegible] made by one who was not a stranger, but a joint trespasser, and [illegible] became [illegible] stranger [illegible] a good bar.

Turner v. *Wal*

(a) [illegible] pass," but the [illegible] action of [illegible] *Fitz. Br.* tit. *Issue*, [illegible]

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Such seems to be the state of authority upon that question: and the court does not feel called upon to express any opinion upon the point, although it must be obvious that the decision in the 36 *H.* 6., reported in *Fitzherbert*, is consistent with reason and justice. (*a*)

The court, in this case, is of opinion that the plea is bad upon other grounds; and it is therefore unnecessary further to investigate the general point referred to. (*b*)

Judgment for the plaintiffs.

(*a*) Lord *Bacon*, in the preface to his Rules and Maxims, says that he might have made an ostentation of learning, by vouching authorities, but that he abstained from it, "having the example of Mr. *Littleton* and Mr. *Fitzherbert*, whose writings are the Institutions of the Laws of *England*, whereof the one forbeareth to vouch authority altogether, and the other never reciteth a book but when he thinketh the case so weak of credit in itself, as it needs a surety."

What *Bacon* here says relates to *Fitzherbert's Natura Brevium*. *Fitzherbert's Abridgment* rests wholly on authorities either taken from the Year Books, or from original cases now no where else extant. To the latter class belongs the case 36 in *H.* 6., above referred to. Another case of the same class in *Fitz.Abr.*, *M.* 33 *E.* 1., tit. *Annuitie*, pl. 51., is to this effect: — "Annuity against heir, upon a deed of grant made by his father until the defendant (the plaintiff) should be advanced to a suitable (*covenable*) benefice. *Tilton*. After the death of our father, our mother gave to the plaintiff, at our procurement, and in our discharge, the deanery of *T.* of which the plaintiff is now seised. *Herle*. The writing is, 'until he be advanced *by the grantor or his heirs*.' *Hengham*. *Qui per alium facit, per seipsum facere videtur*, and awards that he answer over. *Herle*. The mother of the defendant gave us the deanery for our service, and not in discharge of the annuity: and this he is ready to verify. *Et alii e contrà*."

(*b*) As to which, see *Roe* v. *Haugh*, 1 *Salk.* 29.; *Buckmyr* v. *Darnall*, 2 *Ld. Raym.* 1085. 1087.; *Anstey* v. *Marden*, 1 *N. R.* 124. 128.; *Ayrey* v. *Davenport*, 2 *N. R.* 474. 476.; *White* v. *Cuyler*, 1 *Esp. N. P. C.* 200., 6 *T. R.* 176.; *Drake* v. *Mitchell*, 3 *East*, 251. See the distinction in the Civil Law between the engagement of an expromissor and that of an adpromissor, *Vinn. Inst. Imp. Comm.* lib. 2, tit. 1., *De Rerum Divisione*, &c., p. 155; *Ibid.*, lib. 3, tit. 1., *De Fidejussoribus*, p. 726.; *Ibid.*, lib. 4, tit. 6, § 9., *De Constitutâ Pecuniâ*, p. 887.

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BUTLER *v.* FOX.

Jan. 31.

The court discharged so much of an order for a commission to examine witnesses, as stayed the proceedings, on the ground of an unreasonable delay in the application.

ASSUMPSIT on a sea-policy for 5000*l.*, on wheat, free of average, the question being, whether the loss was total or partial. The action was commenced on the 13th of *November*, 1847, and issue was joined on the 12th of *February*, 1848. On the 28th of *March*, 1849, a commission issued, to examine witnesses at *Baltimore*, both parties joining in it. The defendant being induced by letters from *Baltimore*, to think he might get additional evidence at *New York*, obtained an order for the examination of witnesses at the latter place.

Byles, Serjt., on a previous day in this term, obtained a rule nisi to set aside that order, or so much thereof as directed that the proceedings should be stayed in the meantime, on the ground that the defendant had been guilty of laches.

James Wilde, who shewed cause, submitted that, seeing the length of time the cause had been pending, the defendant's delay in applying for the second commission was not so unreasonable as to disentitle him to have his commission with all its usual incidents,—the delay having only been of twenty days.

Byles, Serjt., in support of the rule, shewed that the delay amounted to the whole time necessary for a voyage between *London* and *America*.

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WILDE, C. J. The court is of opinion that the rule should be made absolute to discharge so much of the order of my brother *Talfourd* as stays the proceedings, —but without prejudice to an application on the part of the defendant, to the judge, to postpone the trial if the commission should not be returned in time. My own impression, I must confess, is, that, where the plaintiff has so long delayed his proceedings as to shew that his object was not expedition, he has no right to complain of so small an additional delay as twenty days. But the rest of the court being of opinion that such delay, unaccounted for, is unreasonable, the rule will be made absolute in the form I have already stated.

Rule absolute accordingly.

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Ex parte JOHN PURDY.

Jan. 25.

An order of commitment under the county-court act, 9 & 10 *Vict. c.* 95., is not to be construed with the same strictness as a conviction: and such an order is not bad for alleging the offence to be, that the defendant had made a gift, delivery, *or* transfer of property, with intent to defraud his creditors."

JOHN PURDY was, on the 16th instant, arrested by virtue of a warrant in the following form:—

"In the *Bloomsbury* County-Court of *Middlesex*, holden at *Berners Street, Oxford Street*, in the said county.

"Between { *Archibald Cubitt*, Plaintiff, and *John Purdy*, Defendant.

"To the high bailiff and other bailiffs of the said court, and all constables and peace-officers within the jurisdiction of the said court, and to the governor of the debtors' prison, *Whitecross Street*, in the said county:

The order recited a judgment recovered against the defendant in the county-court: it then recited that the defendant, *having personally appeared to the said summons*, and being present in court, and having neglected to pay the sum recovered, was, upon the application of the plaintiff, *then and there* examined touching his estate, &c.; that it appeared to the judge, upon such examination, that the defendant had obtained credit from the plaintiff under false pretences, and had made "a gift, delivery, *or* transfer of property with intent to defraud his creditors," but the defendant requested to be allowed time to produce evidence; that the hearing was thereupon adjourned; that the defendant did not attend on the adjournment day; that it *then* appeared to the satisfaction of the judge, that the defendant had obtained credit from the plaintiff under false pretences, and had made "a gift, delivery, *or* transfer of property with intent to defraud his creditors;" and that thereupon the judge ordered and adjudged that the defendant should be committed for forty days, &c.:—

Held, that the recitals in the order imported an appearance by the defendant at the trial, and an examination of the defendant at that time, and consequently that it was a valid order within the 101st section of the act; and that a summons under the 98th and 99th sections was unnecessary.

Semble, that a judgment obtained in a county-court, in respect of which the debtor subsequently obtains a final order of protection from the insolvent debtors court, does not thereby cease to be an *unsatisfied judgment*, within the meaning of the 98th section of the 9 & 10 *Vict. c.* 95. (*a*)

(*a*) *S. P.* decided accordingly, *Abley* v. *Dale*, *post*, *T. T.* 1851.

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"Whereas, at a court holden at the court-house in *Berners Street* aforesaid, on the 11th of *January*, 1849, the above-named plaintiff, by the judgment of the said court, in a certain suit wherein the said court had jurisdiction, recovered against the above-named defendant the sum of 20*l.* for his debt, together with the sum of 4*l.* 19*s.*, the costs of the said suit; whereupon, it was then and there ordered by the said court, that the said defendant should forthwith pay to the said plaintiff the said sums of 20*l.* and 4*l.* 19*s.*, so recovered against the said defendant: And whereas the said defendant, *having personally appeared to the said summons, and being present in court,* and having then neglected and refused to pay the said sums so recovered, was, upon the application of the said plaintiff, then and there examined touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action in which the said judgment was obtained against him, and as to the means and expectations he then had, and as to the property and means which he still had, of discharging the said debt and costs, and as to the disposal he had made of any property: And whereas it appeared, upon such examination, to the judge of the said court, that the said defendant *had obtained credit from the plaintiff under false pretences,* and had made *a gift, delivery,* or *transfer* of property, with intent to defraud his creditors; but the said defendant then requested to be allowed time to produce certain evidence; and, upon his, the said defendant's, application, the judge of the said court granted time to the said defendant until the 18th day of *January*, 1849, and postponed and adjourned making any order, or otherwise adjudicating in respect of the said examination, until the said 18th day of *January*, 1849: And whereas a court was duly holden by the said judge at the said court-house in *Berners Street* aforesaid, on

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the said 18th of *January*, 1849, and the said defendant *did not attend* at such last-mentioned court, or allege any sufficient excuse for not attending, and did not at such court produce any evidence, or allege any sufficient excuse for the non-production of such evidence: And whereas it *then* appeared, to the satisfaction of the judge of the said court, that the said defendant *had obtained credit from the plaintiff under false pretences*, and had made *a gift, delivery*, or *transfer* of property, with intent to defraud his creditors; and thereupon the said judge of the said court, by a certain order, bearing date the said 18th day of *January*, 1849, did order and adjudge the said defendant to be committed, for the term of forty days, to the debtors' prison at *Whitecross Street*, &c., or until he should be discharged by due course of law: These are, therefore, to require you, the said high-bailiff, bailiffs, and others, to take the said defendant, and to deliver him to the governor of the debtors' prison at *Whitecross Street* aforesaid; and you, the said governor, are hereby required to receive the said defendant, and him safely to keep in the said prison, for the term of forty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law; for which this shall be your sufficient warrant. Given under the seal of the court, the 11th day of *January*, 1850.

" *J. Wright*,
" Clerk of the Court."

Parry, on a former day in this term, moved for a writ of *habeas corpus*, to bring up the prisoner to be discharged, and also for a *certiorari* to bring up the order upon which the warrant issued.

Discharge under the insolvent act.

It appeared from the affidavits on which the motion was founded, that the prisoner was discharged under the insolvent debtors acts, on the 2nd of *April*, 1849,—the

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debt mentioned in the above warrant, being duly inserted in his schedule. It was therefore submitted that the defendant was discharged from that debt, by virtue of the 1 & 2 *Vict. c.* 110. *s.* 90., which enacts, "that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her according to this act, or for or by reason of any debt or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same." The commitment in question cannot be affected by the 102nd section of the 9 & 10 *Vict. c.* 95., which enacts, "that, whenever any order of commitment shall have been made as aforesaid (s. 99.), the clerk of the said court shall issue, under the seal of the court, a warrant of commitment, directed to one of the bailiffs of any county-court, who by such warrant shall be impowered to take the body of the person against whom such order shall be made; and all constables and other peace-officers, within the several jurisdictions, shall aid in the execution of every such warrant; and the gaoler or keeper of every gaol, house of correction, and prison mentioned in any such order, shall be bound to receive and keep the defendant therein until discharged under the provisions of this act, or otherwise by due course of law; *and no protection, order, or certificate granted by any court of bankruptcy, or for the relief of insolvent debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order.*" That clause can only apply in cases where the protection, order, or certificate is obtained *after* the order of commitment by the judge of the county-court. The material sections of the county-court act upon which the question will turn, are, the

98th and the 99th. The 98th enacts "that it shall be lawful for any party who has obtained any *unsatisfied* judgment or order, in any court held by virtue of this act, or under any act repealed by this act, for the payment of any debt or damages or costs, to obtain a summons from any county-court within the limits of which any other party shall then dwell or carry on his business,—such summons to be in such form as shall be directed by the rules made for regulating the practice of the county-courts, as herein provided, and to be served personally upon the person to whom it is directed,—requiring him to appear, at such time as shall be directed by the said rules, to answer such things as are named in such summons; and, if he shall appear in pursuance of such summons, *he may be examined upon oath* touching his estate and effects, and the manner and circumstances under which he contracted the debt, or incurred the damages or liability, which is the subject of the action in which judgment has been obtained against him, and as to the means and expectation he then had, and as to the property and means he still hath, of discharging the said debt or damages, or damages or liability, and as to the disposal he may have made of any property; and the person obtaining such summons as aforesaid, and all other witnesses whom the judge shall think requisite, may be examined upon oath touching the inquiries authorised to be made as aforesaid; and the costs of such summons, and of all proceedings thereon, shall be deemed costs in the cause." And the 99th section enacts, "that, if the party so summoned shall not attend, as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn, or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of such judge, or if it shall appear to such judge, either by

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examination of the party, or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same, or *shall have made or caused to be made any gift, delivery, or transfer of any property*, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them, or if it shall appear, to the satisfaction of the judge of the said court, that the party so summoned, has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt, or damages, or costs so recovered against him, either altogether or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter (s. 100.) provided,—it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for any period not exceeding forty days." It is submitted that here the debt was extinguished, so far as the county-court was concerned, on the 2nd of *April*, 1849. [*Maule*, J. In effect, you contend, that, by force of the order of the insolvent debtors court, this is a *satisfied* judgment.] Yes. [*Maule*, J. Should not the defendant have applied for a summons calling upon the plaintiff to shew cause why the order of commitment should not be rescinded?] Notice was given on the

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12th of *April*, 1849. [*Maule*, J. Notice amounts to nothing. I do not think the defendant has made out a *primâ facie* case for a *habeas corpus*.]

No allegation in the warrant, that the defendant was summoned.

The warrant of commitment is altogether insufficient in point of law. This is a proceeding of a penal nature: *Ex parte Kinning* (*a*); *Kinning* v. *Buchanan*. (*b*) [*Maule*, J. Assume that the judge of the county-court has power to commit for certain offences, and to punish by an imprisonment of forty days.] The warrant should shew jurisdiction: and, to give jurisdiction, it should shew that a summons under s. 98. had been issued, and personally served. In that respect, this warrant is defective: it does not, in terms, state that the defendant was so summoned. The defendant's voluntary appearance might have been for one purpose; his examination and subsequent commitment might have been on another account. [*Maule*, J. The warrant seems to proceed upon the 101st section, which enacts, "that in every case where the defendant in any suit brought in any county-court, shall have been personally served with the summons to appear, or shall personally appear in the court at the time the judge, at the hearing of the cause, or at any adjournment thereof, if judgment shall be given against the defendant, shall have the same power and authority of examining the defendant and the plaintiff and other persons touching the matter [illegible] and of committing the defendant [illegible] and of making an order, he [illegible] under the provisions hereinbefore [illegible] that the plaintiff had obtained a summons for that purpose after the judgment [illegible] as hereinbefore [illegible]." There is no allegation in the warrant that the defendant was present at the time of giving judgment. [*Maule*, J. Was this point

(a) [illegible] (b) [illegible]

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No statement that the defendant was examined on oath.

urged before my brother *Erle?* (*a*)] It was not; nor was the 101st section at all adverted to. [*Wilde*, C. J. We think you should have a rule upon this point.]

Another objection to the warrant, is, that there is no statement on the face of it, that the defendant was examined on oath. [*Cresswell*, J. The party is committed for not appearing.] Not so: the commitment proceeds upon the grounds previously set forth in the warrant: it was upon the examination of the defendant that the court adjudicated. [*Wilde*, C. J. The statement seems rather to import that the investigation took place in his absence.] In the case of *in re Gray* (*b*), a warrant of commitment (*c*) reciting that "whereas *J. G.* was duly brought before me, to answer the said complaint, and I, the said justice, *duly thereupon, then and there, in the presence as well of the said J. J. (the complainant) as of the said J. G., did examine and inquire into the proofs and allegations* of the said parties touching the matter of the said complaint," &c.,—was held bad, inasmuch as it did not shew that the witnesses were examined on oath, or in the presence of the defendant. [*Wilde*, C. J. Bankrupt commissioners had no authority to examine *the bankrupt* except upon oath: but, upon an indictment for perjury, Lord *Mansfield* held that the examination must be assumed to have been upon oath.]

Several offences alleged, and only one penalty.

The warrant is also bad for alleging several offences together, and attaching only one penalty. [*Maule*, J. For anything that appears, the *order* may have been distributive.] If the warrant recites the order, as it professes to do here, it must recite it correctly. In *Newman* v. *Bendyshe* (*d*), a conviction under s. 14. of the 11 *G.* 4. & 1 *W.* 4. *c.* 64. (for the general

(*a*) Who had refused, at chambers, to grant a *habeas*.

(*b*) 1 *New Sess. Cas.* 354.

(*c*) Under the 4 *G.* 4. *c.* 34. *s.* 3.

(*d*) 10 *Ad. & E.* 11., 2 *P. & D.* 340.

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sale of beer, &c.) purported to charge the party with the offence of keeping his house open for the sale of beer, *and* selling beer, *and* suffering the same to be drunk and consumed in the house at an unlawful time, and convicted him in the penalty of 40*s.*, as upon a single offence,—was held bad, because it included more than one distinct offence, for which the party might have been distinctly convicted. [*Maule*, J. How does it appear here that the penalty is uncertain? In *O'Connell's* case (*a*), nobody ever suggested, that, if *all* the counts of the indictment had been good, and each of them had charged an offence which would have warranted an imprisonment for the whole period, the non-distribution of the penalty would have been ground of error. There is clearly nothing in this objection.]

Offence alleged in the alternative.

The next objection is, that the offence is stated in the alternative,— that the defendant had made "a gift, delivery, *or* transfer of property, with intent to defraud his creditors." This involves three distinct and different offences. [*Maule*, J. Like charging a man with stealing a "horse, mare, *or* gelding?"] Precisely so. In *The King* v. *John North* (*b*), an information on the 48 *G.* 3. *c.* 143., for selling "beer *or* ale" without an excise licence, was held bad; and a conviction thereon, shewing that the defendant had sold ale only, was quashed, —*Bayley*, J., observing, "This defendant is called upon to answer an alternative charge, which cannot, I think, be made certain by evidence." So, in *The King* v. *Henry Pain* (*c*), an alternative charge in a *conviction* was held to be bad. That was a conviction, on the 6 *G.* 4. *c.* 108. *s.* 49., for being on board a boat liable to forfeiture, by s. 3., for having casks attached thereto, "of the description used, *or* intended to be used, for

(*a*) *O'Connell* v. *The Queen*, 11 *Clark & Fin.* 155.

(*b*) 6 *D. & R.* 143.

(*c*) 7 *D. & R.* 678.

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the smuggling of spirits:" and the court quashed it for uncertainty; *Abbott*, C. J., saying, — "Whether the decision in *Rex* v. *Middlehurst* (*a*) is correct, is not a question now before us; but that is a direct authority to shew, that, in an indictment, the objection taken to this conviction would be fatal; and I know of no authority which says that a conviction must not have as much certainty as an indictment. Now, this act of parliament mentions three sorts or descriptions of casks, which, if found on board, or attached to, a vessel, will render it liable to forfeiture. One is, a sort which is used; the second is, intended to be used; and the third, that which is fit or adapted for the purpose. Having mentioned these three, as distinct descriptions of casks, I think the conviction should have set forth under which of the three the casks in question fell. It is a very nice and subtle objection, and quite beside the merits: nevertheless, the party is entitled to the benefit of it, as a defect of form." And, in the case of *The King* v. *Henry Salomons* (*b*), a conviction for "the said offence," when there are two offences charged in the information, was held to be bad. [*Maule*, J. There can be no doubt about that.]

WILDE, C. J. We think the rule should go upon the first and the last objections to the form of the warrant of commitment; and also for a *certiorari* to bring up the order. As to the objection that the warrant does not state that the defendant was examined on

(*a*) 1 *Burrow*, 399. Lord *Mansfield* there says: "Upon indictments, it has been determined that an *alternative* charge is not good; as 'forged *or* caused to be forged,' though *one only* need be proved, if laid conjunctively (as, 'forged *and* caused to be forged'). But I do not see the reason of it: the substance is exactly the same; the defendant must come prepared against both. And it makes no difference to him in any respect."

(*b*) 1 *T. R.* 249.

oath, that does not seem to us to require any further consideration. Nor do we think that the non-distribution of the forty days, affords any ground of complaint, —the entire period not being greater than might have been affixed to each of the offences pointed at.

Parry suggested that he was entitled to the *writ:* but

The Court said it had been settled by the Queen's Bench, after argument, that the proper course was, to grant a rule to shew cause why a writ of *habeas corpus* should not issue,—the rule to be served upon the plaintiff in the suit, and also upon the judge of the court out of which the warrant issued.

Udall now shewed cause. The rule was granted upon two points only,—first, that the warrant under which the defendant was committed, does not state that the defendant was previously summoned to appear in the county-court, pursuant to the 98th section of the 9 & 10 *Vict. c.* 95., or that he was present at the hearing,—secondly, that the offence is stated in the disjunctive. 1. The warrant is in the form settled by the judges, under the power conferred upon them by the 73rd section of the act.(*a*) It sufficiently shews that

(*a*) Which enacts "that five of the judges of the superior courts of common law at *Westminster*, including the lord chief justice of the court of Queen's Bench, the lord chief justice of the court of Common Pleas, and the lord chief baron of the court of Exchequer, or one of the said chiefs at the least, shall have power to make and issue all the general rules for regulating the practice and proceedings of the county-courts holden under this act, and also to frame forms for every proceeding in the said courts for which they shall think it necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the clerks of the said courts, and from time to time to alter any such rule or form; *and the rules so made, and the forms so framed, shall be observed and used in all the courts holden under this act;* and, in any case not expressly provided for herein, or by the

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all that was done, was done strictly in conformity with the provisions of the statute: it alleges that the defendant appeared at the hearing, and that the whole proceeding took place at the hearing, or at an adjournment thereof. It was not a proceeding under the 98th and 99th sections, but under the 101st, which gives the judge, in cases where the party has been personally served with the summons, or shall personally appear at the trial, the same power to examine and to commit the defendant, as he is enabled to exercise under s. 99. where the party has been summoned pursuant to the 98th section. 2. As to the other point,—the 99th section enables the judge, if it shall appear to him, either by the examination of the party, or by any other evidence, that the defendant has obtained credit from the plaintiff under false pretences, or has made or caused to be made any "gift, delivery, or transfer" of any property, to punish him by imprisonment for a period not exceeding forty days. The statement that the defendant had obtained credit under false pretences alone, would justify the penalty here imposed; and therefore that would be sufficient to sustain this warrant, even if it is to be construed with the same strictness as a conviction. Besides, a gift, delivery, or transfer of property, with intent to defeat creditors, is one substantive offence.

Parry, in support of the rule. The warrant in question neither complies with the 98th nor the 101st sections. The forms made in pursuance of the 78th section, are merely directory to the judges of the county-courts: the judges who framed them had

said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, in actions and proceedings in the several courts."

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to defraud his creditors," applies to all three, not to either specifically.

WILDE, C. J. It does not appear to me that either of the objections upon which this rule was granted, has been sustained. The first objection was, that it does not appear upon the face of the warrant, that the defendant was summoned, or was present when the order in question was made; and it is said that the order is therefore bad. Now, this warrant issued upon a proceeding under the 101st section of the 9 & 10 *Vict. c.* 95., which enacts, "that, in every case where the defendant in any suit brought in any county-court, shall have been personally served with a summons to appear, or shall personally appear at the trial of the same, the judge, at the hearing of the cause, or at any adjournment thereof, if judgment shall be given against the defendant, shall have the same power and authority of examining the defendant and the plaintiff and other parties touching the several things thereinbefore mentioned, and of committing the defendant to prison, and of making an order, as he might have and exercise under the provisions hereinbefore contained in case the plaintiff had obtained a summons for that purpose after judgment obtained, as thereinbefore mentioned." That refers to the provisions contained in the 98th and 99th sections. The 98th section enables parties having unsatisfied judgments, to obtain summonses calling upon the defendant to answer in respect of certain matters, that is "touching his estate and effects, and the manner and circumstances under which he contracted the debt, or incurred the damages or liability, which was the subject of the action in which judgment had been obtained against him, and as to the means and expectation he then had, and as to the property and means he still had, of discharging the said debt or damages or liability, and as to the disposal he

might have made of any property." The consequences of non-attendance, or not sufficiently answering, are pointed out by s. 99., which enacts, "that, if the party so summoned shall not attend, as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn, or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of such judge, or if it shall appear to such judge, either by the examination of the party, or by other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same, or shall have made, or caused to be made, any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors, or any of them, or if it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt, or damages, or costs, so recovered against him, either altogether, or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided, — it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident, or to any prison which shall be provided as the prison of the court, for

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knowingly aiding and assisting in fraudulently removing and carrying away five cows, &c., *or* in concealing the same. Now, concealment and removal are two very different things; and yet the order was held good. So, in *The King* v. *Lloyd*, articles of the peace were exhibited against a clerk of the peace, charging him with being gutlty of several distinct offences; and an order of dismissal stating that the party had been guilty of several of the charges, was held good,—although a forfeiture of a freehold office was worked by means of that conviction. The second ground of objection, therefore, likewise fails.

The rest of the court concurring,

Rule discharged, with costs.

Ex parte WILLIAM DAGGETT (Late WILLIAM DAGGETT INGLEDEW).

Jan. 19.

The court of Queen's Bench having allowed an attorney to alter his name on the roll, this court (for the sake of uniformity) allowed it

UDALL moved, on the part of Mr. *Daggett*, an attorney of this court, for leave to expunge from the roll the surname of *Ingledew*. The affidavit upon which the motion was founded (that of Mr. *Daggett*), stated, that the deponent, on the 6th of *May*, 1848, was duly admitted to be an attorney of this court, by his then name of *William Daggett Ingledew*; that on the 6th of *January*, 1824, *Henry Ingledew*, of &c., the father of this deponent, intermarried with *Jane Daggett*, of &c. who was the only child and heiress-at-law of *William Daggett*, late of &c., deceased; that the deponent was the eldest son of such marriage;

that, on the 7th of *December* last, the said *Jane*, the mother of the deponent, died, leaving the deponent her heir-at-law; that, prior to her death, the mother of the deponent frequently expressed her will and desire, as well to the deponent as to his said father, that he, the deponent, should, after the decease of his said mother, use and bear the names of *William Daggett* only, instead of those of *William Daggett Ingledew*; and that, in compliance with such wish and desire, the deponent had from and since the 8th of *December* last, used and borne the names of *William Daggett* only.

The learned counsel stated that the court of Queen's Bench had already permitted the alteration to be made upon the roll there (*a*); and he referred to *Ex parte Hayward* (*b*), where this court had, under similar circumstances, declined to accede to a similar application, and to *Ex parte Benthall* (*c*), where they had allowed it: and he submitted that it was desirable that there should be uniformity of practice in such a matter.

MAULE, J. It certainly is right that there should be no difference of practice in a matter of such trivial importance.

The rest of the court concurring,

Rule absolute. (*d*)

(*a*) 1 *L. M. & P.* 1.

(*b*) 5 *Scott*, 712., *S. C. per nom. Ex parte Ware*, 6 *Dowl. P. C.* 463.: and see *Ex parte Were*, 6 *Dowl. P. C.* 311., where the rule was granted by the court of Queen's Bench,—being the same case in which this court had declined to accede to the application.

(*c*) 1 *D. & L.* 747., 6 *M. & G.* 722., 7 *Scott, N. R.* 407.

(*d*) The rule was drawn up as follows: — "It is ordered that the names of the said '*William Daggett Ingledew*,' entered on the roll of attorneys of this court on the 6th day of *May*, 1848, be altered, by striking out the name of '*Ingledew*' therefrom.

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the admission of the said *Josiah Dearden.*"

In the same case, the rule made by this court (*Nov.* 8. 1850), was in the following terms: — "It is ordered, that the master be at liberty to amend the roll of attorneys of this court, by altering the name of '*Josiah Dearden*' to '*Josiah Heaton Dearden*;' and that the said master be at liberty to make an indorsement on his admission in this court accordingly."

The affidavit upon which this court acted in that case, was as follows: — *Josiah Heaton Dearden*, one of the attorneys of this court, maketh oath and saith, that he was admitted an attorney of this court, and signed the roll of attorneys, by the name of '*Josiah Dearden*,' in *Hilary* term, 1833, the surname '*Dearden*' being that of the defendant's father; that the deponent had ever since practised, and still continued to practise, as an attorney in *Manchester*; that this deponent's mother, *Sarah Dearden*, whose maiden name was *Sarah Heaton*, died in the month of *December* last; that this deponent, from the great love and respect he felt for his said parent, had assumed her surname of '*Heaton*,' in addition to that of '*Dearden*,' now using the surnames '*Heaton Dearden*;' that this deponent has made this change from no improper purpose, but *bonâ fide*, and without fraud; and that this deponent is not apprehensive of any proceedings of any kind whatever being taken against him by the name of *Josiah Dearden.*"

The following remarks are suggested by the clerk of the rules: —

Before the passing of the 6 & 7 *Vict.* c. 73., what was usually referred to as the roll of attorneys in this court, was, a *book* in which the names and addresses of persons *admitted* attorneys of the court, were — by 2 *G.* 2. *c.* 23. *s.* 18., — inrolled by the clerk of the warrants, with whom all admissions were required to be left for that purpose. Since that statute, in compliance with its 27th section, there is also kept a *roll*, which is *signed* by all persons who, being attorneys of one of the other superior courts, and producing their admission in such other court, become attorneys of this court. The book, formerly called the roll, is still kept by the masters, as before. In the case, therefore, of a change of name by an attorney who was admitted in this court *before* the passing of the 6 & 7 *Vict.* c. 73., the rule for altering the roll should be in the form adopted in this court in *Ex parte Dearden.* But, in the case of an attorney admitted *since* the passing of that statute, the proper form is, — "that the master be at liberty *to permit A. B. C.* to amend the roll of attorneys of this court, by altering the name '*A. C.*' thereon to '*A. B. C.*' &c."

In *Ex parte Thomas James*, *antè*, p. 220., the applicant sought for the first time to become an attorney of this court by signing the roll kept pu suant to the directions of t 6 & 7 *Vict.* c. 73. *s.* 27.; there, it will be perceived, the rule is framed according

Rolls had allowed the rolls of their respective courts to be amended in the manner prayed. *Ex parte Daggett* (a) was referred to. [*Cresswell*, J. That case presented less difficulty than this, for, there, the party had a double surname; and all that he asked for, was, to be permitted to abandon a portion of it. Here, however, the alteration contemplated will leave only the Christian name, "*Thomas-James*," which is all one name. It may, therefore, be said hereafter, that this person is not upon the roll at all. *Wilde*, C. J. "*Moses*" may come again to-morrow, and with as much reason ask us to allow him to drop "*James*." Before we grant this application, it will be advisable to consult some of the other judges.]

Cur. adv. vult.

WILDE, C. J., now said that Mr. Justice *Cresswell* had spoken to some of the other judges upon the subject, and that the result was that they thought the application might be granted.

Rule absolute. (b)

(a) *Antè*, p. 218.

(b) In the case of *Dearden, in re*, 5 *Exch.* 740., 1 *L. M. & P.* 666., — where the application was, for a rule directing the master to substitute the name of *Josiah Heaton Dearden* on the roll, in the place of *Josiah Dearden*, and that the master might be at liberty to make an indorsement of such alteration of name on the admission of the applicant, — it is said that the court of Exchequer refused to alter the roll, but directed the master to make a memorandum on the roll, opposite the party's name, stating that he was now known by the name of *Josiah Heaton Dearden*, and that the memorandum was made by rule of court.

The rule drawn up in that case in the Queen's Bench, was as follows: — "It is ordered, that the name of the said *Josiah Dearden*, on the roll of attorneys of this court, be altered, by inserting the name of '*Heaton*' after that of '*Josiah*,' so that the name of '*Josiah Heaton Dearden*' stand on the roll of attorneys instead of that of '*Josiah Dearden*:' and that the master be at liberty to make an indorsement of such alteration on

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Ex parte Dearden.

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THORNE *v.* SIMMONS.

Jan. 31.

A writ of prohibition cannot (at least except under special circumstances) be moved for on the last day of term.

GRIFFITHS moved for a prohibition to the judge of the county-court of *Bedfordshire*. It appeared from the affidavit upon which the motion was founded, that the plaint was levied for the recovery of an unliquidated balance of a partnership account, the plaintiff claiming 7*l.* 12*s.* 6½*d.*; that the hearing took place on the 26th of *November* last; and that the judge made an order for the payment of the amount on a distant day, with a view to enable the defendant to apply to this court. *Woodhams* v. *Newman* (*a*) was cited. [*Maule*, J. I find it laid down in *Tidd*'s Practice (*b*), that "a prohibition is not in general grantable on the last day of term (*c*); but a rule may be obtained, on motion, to stay proceedings till the ensuing term (*d*); and, in one instance (*e*), it was granted on motion the last day of term, leave having been obtained the day before to move it then."]

WILDE, C. J. It appears that this case was heard before the judge of the county-court on the 26th of *November* last, and that he made an order for payment of the debt by the defendant on a distant day, for the purpose of affording him time to make an application to this court. The defendant delays his application until the last day of the term. Now, it appears to have been the practice of the court for a very long period, not to grant prohibitions on the last day of term, when the

(*a*) *Antè*, Vol. VII. p. 654.
(*b*) 9th edit. Vol. I. p. 498.
(*c*) Citing an anonymous case, from *Latch*, 7., 2 *Roll. Rep.* 456.
(*d*) Citing *Latch*, 7.
(*e*) Citing *Catchside* v. *Ovington*, 3 *Burr.* 1922.

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(*a*) [illegible]
(*b*) [illegible]
(*c*) [illegible] from [illegible]
(*d*) [illegible]
(*e*) [illegible] v. [illegible], [illegible]

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any period not exceeding forty days." That provision applies where the defendant is summoned *after judgment.* The 101st section gives the judge the same power where the defendant personally appears *at the trial.* It is under this latter section that this warrant was issued; and the judge appears to have followed the form provided by the judges pursuant to the 78th section. Forms are generally given for the purpose of getting rid of difficulties arising from immaterial matters, by the misrecital of which justice is often evaded. The form in question only states what was deemed to be material. It is not given for the purpose of being used or not, at the discretion of the judge: the statute makes it imperative to observe it. The warrant begins by reciting, that, on the 11th of *January,* 1849, the plaintiff, by the judgment of the court, recovered against the defendant a certain sum for debt and a certain sum for costs, and it was thereupon then and there ordered by the court that the defendant should forthwith pay those sums to the plaintiff. It then goes on to recite, that, the defendant *having personally appeared to the said summons, and being present in court,* and having *then* neglected and refused to pay the sums so recovered, was, upon the application of the plaintiff, *then and there examined* touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action, &c., and as to the disposal he had made of any property. The personal appearance which is recited in the form, refers evidently to the appearance *at the hearing.* The warrant shews, that the defendant appeared personally to the summons, that, it appearing to the judge, upon the examination of the defendant, that he had obtained credit from the plaintiff under false pretences, and had made a gift, delivery, or transfer of property, with intent to defraud his creditors, but that, the defendant requesting time to

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BREACH and Another *v.* O'BRIEN.

Jan. 19.

Held, that, where a rule for a special jury is obtained for delay, the proper course is, not to move to set aside the rule, but, to move that the cause may be tried, in its turn, by a common jury, if the defendant is not ready with his special jury.

THIS was an action of debt for 65*l.* 5*s.* 4*d.*, the balance of an hotel bill. Pleas, *nunquam indebitatus*, payment, and, as to 2*l.* 17*s.* 6*d.*, the tippling act. (*a*)

Issue was joined, and notice of trial given for the first sitting in the present term. On the 14th the plaintiff's attorney discovered that the defendant had marked the cause as a special jury cause, and, upon inquiry, he found that the defendant had obtained a rule for a special jury on the 9th, although he had not served it.

Lush, on a former day, obtained a rule calling upon the defendant to shew cause why the rule for a special jury should not be discharged, on the ground that the defendant had been guilty of laches in not acting promptly upon the rule, and that it had been obtained for delay.

Ball, now shewed cause. He submitted that the defendant had an undoubted right, under the statute (*b*),

(*a*) 24 *G.* 2. *c.* 40. *s.* 12.

(*b*) 3 *G.* 2. *c.* 25. *s.* 15., which enacts "that it shall and may be lawful to and for His Majesty's courts of King's Bench, &c., on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action, cause, or suit whatsoever, depending, or to be brought and carried on, in the said courts of King's Bench, &c., or in any of them, and the said courts are hereby respectively authorised and required, upon motion as aforesaid, in any of the cases before mentioned, to order and appoint a jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been and are usually struck in such courts respectively, upon trials at bar had in the said courts, — *which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue.*"

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BREACH v. O'BRIEN.

to have his cause tried by a special jury, provided he complied with the rule of *Hilary* term, 1 *Vict.* (*a*); and the proper form of application was, as in the court of Queen's Bench, for a rule calling upon the defendant to shew cause why the cause should not be tried, in its order, by a common jury, if there was no special jury ready to try it.

Lush, contrà, was content to take the rule in that form, but submitted that he was entitled to the costs of the rule. [*Williams*, J. Why should the defendant pay costs when he is quite regular?] In *Phelps* v. *Keily* (*b*), it was laid down by this court, upon the authority of *Gunn* v. *Honeyman* (*c*), that a rule for a special jury obtained by the defendant (or by the plaintiff in replevin), will be discharged, if there be unnecessary delay in serving it. Here, the defendant has not served the rule for a special jury, or given the plaintiffs any notice that it had been obtained. [*Maule*, J. Undoubtedly the rule ought to have been served. But, suppose it had been served, how would your position have been altered?] If it had not been followed up in a *bonâ fide* manner, it might have been set aside.

MAULE, J. *Bona fides* is altogether immaterial, if the proceeding is regular. I think the rule should be made absolute for the cause to be tried, in its order, by

(*a*) "That no rule for a special jury be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice has been given; and, in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day: provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time."

(*b*) 3 *M. & G.* 883., 4 *Scott, N. R.* 376., *S. C. per nom. Phelps* v. *Kirby*, 1 *Dowl. N. S.* 501.

(*c*) 2 *B. & Ald.* 400, 1 *Chitt. Rep.* 234.

a common jury, if the defendant is not ready with his special jury, — the plaintiffs' costs of this motion, to be costs in the cause.

The rest of the court (*a*) concurring,

Rule absolute accordingly. (*b*)

(a) *Williams*, J., and *Talfourd*, J., *Wilde*, C. J., and *Cresswell*, J., being at the court of Criminal Appeal.

(b) See *Chuck* v. *Harris*, 1 *M. & G.* 940., 2 *Scott, N. R.* 82., 9 *Dowl. P. C.* 68. And see *Bush* v. *Pring*, 9 *Dowl. P. C.* 180.; *Gurney* v. *Gurney*, 3 *D. & L.* 734.

DOE *d.* CHURCH *v.* PONTIFEX and Another.

Jan. 21.

Where the consideration for an annuity is a pre-existing debt, no memorial need be inrolled.

THIS was an action of ejectment brought to recover the possession of a house, brewhouse, and premises at *Hackney*, in the county of *Middlesex*.

The cause was tried before *Wilde*, C. J., at the sittings in *Middlesex*, after last *Trinity* term. The facts were as follows: — Towards the close of the year 1837, the

The consideration for an annuity was stated in the memorial thus: — "3000*l.*, part of a sum of 3186*l.* 2*s.* 3*d.*, due and owing from [the grantor] to [the grantees] at the time of granting the said annuity, as follows, —1882*l.* 3*s.* 6*d.* for work and labour and for goods sold and delivered, and 1303*l.* 18*s.* 9*d.* for money lent and advanced, and interest thereon, in the sums and at the times following, — that is to say, 250*l.* paid by the cheque of [the grantees] on, and dated, the 29th of *December*, 1837, and drawn, in the then name of their trading firm, on Messrs. *Smith, Payne, & Smith*, their bankers, — 500*l.* paid by a like cheque, dated the 24th of *February*, 1838, — 23*l.* 10*s.* paid by a like cheque, dated the 28th of *February*, 1838, — 270*l.* paid by a like cheque, dated the 25th of *July*, 1838, — 200*l.* paid by a like cheque, dated the 11th of *January*, 1839, — interest on the above sums respectively up to the 27th of *April*, 1839 (the date of the grant), 60*l.* 8*s.* 9*d.*: " —

Held, that, supposing a memorial to be necessary, the above sufficiently shewed how and when the several sums which constituted the consideration for the annuity, were paid.

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Doe d. Church v. Pontifex.

lessor of the plaintiff applied to Messrs. *Pontifex*, the defendants, to fit up a brewery for him upon certain premises at *Hackney*, of which he was possessed for a term; and, accordingly, on the 19th of *February*, 1838, the following agreement was entered into: —

"Memorandum of agreement made this 19th day of *February*, 1838, between *Joseph Samuel Church*, of &c., brewer, of the one part, and *Edmund Pontifex* and *William Pontifex*, of &c., copper-smiths and engineers, of the other part: Whereas, by an indenture bearing date the 30th of *November*, 1837, and made between *Lawrence Gwynne* of the one part, and the said *Joseph Samuel Church* of the other part, he the said *Lawrence Gwynne* did demise and lease unto the said *Joseph Samuel Church*, his executors, administrators and assigns, all that piece or parcel of ground, with the messuage or tenement called *Cambridge House*, together with the warehouses, coachhouse, stables, and erections thereon, situate on the north side of the *Hackney Road*, *Bethnal Green*, with the appurtenances, and together also with the fixtures and things mentioned in the schedule thereunder written, for the term of thirty-five years from the 29th of *September* then last past, at the annual rent of 100*l.*, payable as therein mentioned, and under and subject to the covenants therein contained on the part of the lessee to be performed: And whereas the said *Joseph Samuel Church*, being desirous of erecting a new brewery upon part of the premises comprised in the said indenture of lease, and of fitting up the same with all necessary utensils, fixtures, and plant, for the purpose of carrying on the business of a brewer therein, applied to the said *Edmund Pontifex* and *William Pontifex*, and requested them to make or supply the necessary advances or funds for paying for the materials, work, and labour, in erecting the said brewery, and to supply the said utensils, plant, and fixtures; and, in consideration thereof,

the said *Joseph Samuel Church* has proposed to the said *Edmund Pontifex* and *William Pontifex* to grant unto them an annuity of such amount, and for such time, and secured in such manner, as hereinafter is agreed upon, and to deposit the said lease as a security for their advances and outlay in the meantime, with interest at 5 *per cent.* until such annuity shall be granted; and to which proposition the said *Edmund Pontifex* and *William Pontifex* have consented and agreed, and have, in pursuance thereof, already advanced the sum of 750*l.*, the sum of 250*l.*, part thereof, on the 29th of *December* last, and the sum of 500*l.* on the day of the date of these presents, to the said *Joseph Samuel Church*, towards the erection of the said brewery, as he the said *Joseph Samuel Church* doth hereby admit and acknowledge, and the building of which said brewery is now in progress; and the same, together with the utensils, plant, and fixtures for the same, is expected to be completed in or about the month of *May* now next ensuing: And whereas, in pursuance of the said agreement, the said *Joseph Samuel Church* has deposited the said lease with the said *Edmund Pontifex* and *William Pontifex*, as they hereby admit: Now, it is hereby witnessed, agreed, and declared, between and by the said *Joseph Samuel Church*, on the one part, and the said *Edmund Pontifex* and *William Pontifex*, on the other part, in manner following, that is to say, that they, the said *Edmund Pontifex* and *William Pontifex*, shall and will furnish and supply all necessary funds for the erection and completion of the said brewery, and also all the necessary utensils, plant, and fixtures to be placed in and about the same, at their usual trade prices, and upon the calculation and dimensions of a ten-quarter brewery; and, further, that the amount due to the said *Edmund Pontifex* and *William Pontifex* in respect of such advances and outlay, work, labour, and materials, shall be

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calculated and ascertained by the parties, if either of them shall require the same, at the end of every fourteen days from the present time, so far as the same shall be then capable of being ascertained, and a memorandum thereof shall be signed by the respective parties, and copies thereof kept by each, and which shall be binding on all parties; and, further, that the said indenture of lease shall remain in the possession of the said *Edmund Pontifex* and *William Pontifex*, as, or in the name of, an equitable charge or mortgage for the amount due and to become due to them from time to time as aforesaid, until the brewery and utensils, fixtures, and plant shall be completed, and until the said annuity shall be granted as hereinafter mentioned; and, further, that, as soon as the said brewery, utensils, plant, and fixtures shall be completed, and the amount due to the said *Edmund Pontifex* and *William Pontifex* for or in respect thereof, shall be ascertained, he the said *Joseph Samuel Church* shall and will grant unto the said *Edmund Pontifex* and *William Pontifex*, their executors and administrators, one clear annuity or yearly sum of such an amount as will be equal to the sum of 11*l.* *per annum* for every sum of 100*l.*, and a fractional part for any sum less than 100*l.*, which shall be then due and owing to the said *Edmund Pontifex* and *William Pontifex*, their executors and administrators, for or in respect of the erection and completion of the said brewery, and the advances already made and to be made for that purpose as aforesaid, and for the said utensils, plant, and fixtures as aforesaid, for and during the natural lives of *Emily Pontifex*, the daughter of *William Pontifex*, party hereto, and *Sarah Pontifex*, the daughter of the above-named *Edmund Pontifex*, and the life of the survivor or longest liver of them, and shall and will charge the same upon the brewery, utensils, plant, and fixtures, and other the premises comprised in the said lease, and shall and will

secure the due payment of the said annuity, by a demise of the said brewery, utensils, plant, and fixtures, and all other the premises comprised in the said lease, to a trustee for the said *Edmund Pontifex* and *William Pontifex*, for the then residue of the said term of thirty-five years thereby granted, except the last five days thereof, at the rent of a peppercorn, if demanded; and in which said grant of annuity and demise shall be contained the usual covenants by the said *Joseph Samuel Church*, his executors and administrators, for the due payment thereof, and for the title to the said demised premises, and the usual powers of distress and entry upon the said demised premises, for obtaining payment of the same annuity, in case the same shall be in arrear for the space of twenty-one days; and also with power, in case the said annuity shall be in arrear for the space of one calendar month, for the said trustee, either to levy and raise, by way of sale, mortgage, or other disposition of the said premises, all the arrears which shall from time to time be due in respect thereof, or else, at the discretion of the said trustee, absolutely to sell the whole of the said premises for the then residue of the said term, and invest the purchase-money at interest, and apply such interest towards payment of the arrears and future payments of the said annuity; with such other usual covenants, remedies, and powers for securing the payment of the said annuity as the counsel of the said *Edmund Pontifex* and *William Pontifex* shall advise; and, further, that, for better securing the said annuity, the said *Joseph Samuel Church* shall and will duly execute a warrant of attorney to confess judgment for double the amount of the purchase-money for the said annuity, with the usual defeasance thereunder written, upon the due payment of the said annuity: And it is further agreed, that the said several securities, and a memorial of the inrolment thereof, if the same shall be

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deemed necessary, shall be prepared by the said *Edmund Pontifex* and *William Pontifex*, but the costs and charges thereof, and all other costs and charges, as well of these presents, as also of or relating to the granting of the said annuity, shall be borne and paid by the said *Joseph Samuel Church;* and, further, that, in the grant of the said annuity, power shall be reserved to the said *Joseph Samuel Church*, his executors and administrators, at any time or times, to re-purchase the said annuity, or any part thereof, not less, at any one time, than one sixth part of the whole, until the whole shall be extinguished, on giving three months' notice thereof, and on payment to the said *Edmund Pontifex* and *William Pontifex*, their executors and administrators, of the amount of the said purchase-money for the same, or a proportionate part thereof, from time to time, in proportion to the amount of such re-purchase, as the case may be, and all arrears thereof up to the date of such re-purchase, and all costs to be incurred thereby. In witness," &c.

The statement of the account between the parties was put in, shewing a balance due to Messrs. *Pontifex* of 3186*l.* 2*s.* 3*d.* The annuity-deed, bearing date the 27th of *April*, 1839, was also put in. It appeared to have been inrolled on the 2nd of *May*, 1839. In the memorial of inrolment, pursuant to the statute, the consideration was thus stated, in the column headed "Consideration, and how paid:"—

"3000*l.*, part of a sum of 3186*l.* 2*s.* 3*d.*, due and owing from the said *Joseph Samuel Church* to the said *Edmund Pontifex* and *William Pontifex*, at the time of granting the said annuity, as follows:—The sum of 1882*l.* 3*s.* 6*d.* for work and labour and for goods sold and delivered, and the sum of 1303*l.* 18*s.* 9*d.* for money lent and advanced and interest thereon, in the sums and at the times following,—that is to say, the sum of 250*l.* paid by the cheque of the said *Edmund*

Pontifex and *William Pontifex*, on, and dated, the 29th of *December*, 1837, and drawn in the then name of their trading firm of '*William Pontifex*, Sons, & *Wood*,' on Messrs. *Smith*, *Payne*, & *Smith*, their bankers, — the further sum of 500*l.* paid by a like cheque, dated the 24th of *February*, 1838, — the further sum of 23*l.* 10*s.* paid by a like cheque, dated the 28th of *February*, 1838, — the further sum of 270*l.* paid by a like cheque, dated the 25th of *July*, 1838, drawn in the then name of the trading firm of '*E.* & *W. Pontifex* & *Wood*,' — the further sum of 200*l.*, paid by a like cheque as last mentioned, dated the 11th of *January*, 1839, — interest on the above sums respectively, up to the 27th of *April*, 1839, 60*l.* 8*s.* 9*d.*

The annuity being in arrear, the defendants entered on the property; and the present action was brought by the grantor to recover possession, on the ground that the annuity deed was void, inasmuch as the memorial was defective, the memorial not shewing that the cheques which formed part of the consideration, had been paid, and not stating at what time they were payable. The following cases were cited, — *Rumball* v. *Murray* (*a*), *Berry* v. *Bentley* (*b*), *Poole* v. *Cabanes* (*c*), *Drake* v. *Rogers* (*d*), and *Abbott* v. *Douglas*. (*e*)

For the defendants, it was insisted, that the word "cheque" imported an instrument payable on demand; and, further, that, the consideration being past, it was not necessary to mention in the memorial any consideration at all.

The learned judge expressed no opinion, but directed a verdict for the plaintiff, reserving leave to the defendants to enter the verdict for them, or a nonsuit.

(*a*) 3 *T. R.* 298.
(*b*) 6 *T. R.* 690.
(*c*) 8 *T. R.* 328.
(*d*) 2 *Brod. & Bingh.* 19. 4 *J. B. Moore*, 402.
(*e*) *Antè*, Vol. 1. p. 483.

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Byles, Serjt., accordingly, in *Michaelmas* term last, obtained a rule nisi. He referred to *Johnson*'s Dictionary, and to *Chitty* on Bills (*a*), for the definition of a "cheque;" and also to *Ex parte Michell* (*b*), *Kelfe* v. *Ambrosse* (*c*), and *Hall* v. *Lack* (*d*), to shew that a consideration that is by-gone, need not be stated in the memorial with the same precision and particularity as a consideration paid at the time.

Whateley and *J. Brown* now shewed cause. The facts are these: — *Church*, a brewer, in the neighbourhood of *London*, applied to Messrs. *Pontifex* to fit up certain premises for him, which they consented to do upon his agreeing to grant an annuity for the lives of two persons named, at the rate of 11 *per cent.* upon the amount of the moneys to be advanced and the work to be done by them; and, accordingly, the agreement of the 19th of *February*, 1838, was entered into. The brewery was afterwards completed at a cost of 3186*l.* 2*s.* 3*d.*, and for 3000*l.*, part of that sum, the annuity was granted. The question is, whether a proper memorial of the deed by which that annuity is secured, has been inrolled pursuant to the statute 53 *G.* 3. *c.* 141. *s.* 2. It is submitted that there has not. In the column headed "Consideration, and how paid," the consideration for the grant is thus stated: — "3000*l.*, part of a sum of 3186*l.* 2*s.* 3*d.*, due and owing from the said *Joseph Samuel Church* to the said *Edmund Pontifex* and *William Pontifex*, at the time of granting the said annuity, as follows: — The sum of 1882*l.* 3*s.* 6*d.* for work and labour and for goods sold and delivered, and the sum of 1303*l.* 18*s.* 9*d.* for money lent and

(*a*) 9th edit. (by *Chitty* and *Hulme*) p. 511.
(*b*) 2 *East*, 137.
(*c*) 7 *T. R.* 551.
(*d*) 1 *Exch.* 300.

advanced, and interest thereon, in the sums and at the times following, that is to say, the sum of 250*l.* paid by the cheque of the said *Edmund Pontifex* and *William Pontifex*, on, and dated, the 29th of *December*, 1837, and drawn on Messrs. *Smith, Payne,* & *Smith*, their bankers,—the further sum of 500*l.* paid by a like cheque, dated the 24th of *February*, 1838,—the further sum of 23*l.* 10*s.* paid by a like cheque, dated the 28th of *February*, 1838,—the further sum of 270*l.* paid by a like cheque, dated the 25th of *July*, 1838,—the further sum of 200*l.* paid by a like cheque as last mentioned, dated the 11th of *January*, 1839,—interest on the above sums respectively, up to the 27th of *April*, 1839, 60*l.* 8*s.* 9*d.*:" in no one instance stating when the cheques were payable, or that they were ever in fact paid. Upon this ground it has been held, by a long series of cases, beginning with *Rumball* v. *Murray* and ending with *Abbott* v. *Douglas*, that the annuity is void. In *Rumball* v. *Murray*, Lord *Kenyon* said: "I agree with the construction put at the bar, that *money* is mentioned in the act, as contradistinguished from *goods*; and, so far, *notes, when paid,* are *money* within the meaning of the act: but still the dates and other particulars of those notes should be set out, otherwise the court cannot see whether a consideration for the annuity was or was not given: for, if they were payable at a distant time, and no allowance made, the true consideration would not appear on the memorial." That case was followed by *Berry* v. *Bentley*, where it was held, that, if the consideration of an annuity be paid by a note or a banker's cheque, the time when it becomes payable must be set forth in the memorial. The same point was decided in *Poole* v. *Cabanes*. In *Drake* v. *Rogers*, the memorial stated the consideration for the annuity to consist of Bank of *England* notes payable on demand, and of a draft payable at a banker's,

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without specifying the time when: the annuity had been paid eleven years, and the attesting-witness and agent of the grantee were both dead. The court set aside the securities, on the ground that the memorial did not state when the draft was payable, or whether it had in fact been paid. *Dallas*, C. J., there said: "In principle, there is a reason why it should appear upon the face of the memorial when the draft was payable, and that reason is given in *Berry* v. *Bentley*. 'The objection was, that the memorial did not set forth when the note was payable, whether immediately or at a distant day; for, if at a distant day, it was not worth 700*l*., by reason of the discount.' Now, the draft in this case might have been payable at a distant day, and the grantor might have lost so much of his consideration as the discount of the draft for the intermediate time might amount to. In substance, therefore, and on principle, here is a ground why the time at which a bill is payable, should appear on the memorial." The last case where the point came distinctly before this court, was that of *Abbott* v. *Douglas*, where part of the consideration money was stated in the memorial to have been paid by "a draft of even date with the indenture, drawn by the grantor on Messrs. *A. B.* & Co.," not saying when the draft was payable; and the memorial was held to be insufficient, and the grant consequently void. In delivering the judgment of the court, *Tindal*, C. J., carefully reviews the earlier cases. After referring to the statute 17 *G.* 3. *c.* 26. *s.* 1., he says: "Under that section, it was held, that all considerations, whether pecuniary or otherwise, must be stated; and that, where a pecuniary consideration, or part of it, was paid by drafts on bankers, or promissory-notes, it was necessary to set them out, and mention the time when they were payable." His lordship then refers to *Rumball* v. *Murray*, *Berry* v. *Bentley*, *Poole* v.

Cabanes, and *Morris* v. *Wall* (a); all which decisions were confirmed by this court in *Drake* v. *Rogers*. The learned chief justice then says: "By the 2nd section of the 53 *G.* 3. *c.* 141., it was enacted, 'that, within thirty days after the execution of every deed, &c., whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, &c., a memorial of the date of every such deed, &c., the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be inrolled in the high court of Chancery, *in the form or to the effect following*, with such alterations therein as the nature and circumstances of any particular case may require.' By this enactment, it is not made necessary to mention in the memorial any but *pecuniary* considerations; but *they* must be stated in the form prescribed by the act, which contains a column headed 'Consideration, and how paid,' and, under that heading, the words,—'100*l.* paid in money, 500*l.* paid in notes of the governor and company of the Bank of *England*, or other notes or bills of exchange, as the case may be.' If, in the present case, part of the consideration had been paid by a bill of exchange, it could not have been contended that the time when it would become payable need not have been stated, that being necessary to shew the real nature and value of the consideration. The same necessity exists for stating the time when a *draft* is payable: and the only question is, whether the memorial now under consideration states the time when the draft upon *Barnetts, Hoare*, & Co. was payable. It does not do so, unless the word 'draft' means draft payable on demand. In several of the cases cited, the courts have refused so to construe it; and those deci-

(a) 1 *B.* & *P.* 208.

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sions are equally applicable to memorials inrolled in pursuance of the 53 *G.* 3. *c.* 141., as to those under the 17 *G.* 3. *c.* 26. We feel that we are bound by them, and that we must say that the memorial in question is insufficient." *Ex parte Michell* will be relied on, as being at variance with the principle of the decisions above cited: that case was, however, referred to, both in *Drake* v. *Rogers* and in *Abbott* v. *Douglas.* The court must be able to see from the memorial, how and when the consideration was paid. To hold this memorial sufficient, would entirely frustrate the intention of the statute. [*Cresswell,* J. The consideration stated in this memorial, is a pre-existing debt. In such a case, is it necessary to shew upon the face of the memorial when the debt was created?] *Kelfe* v. *Ambrosse*(*a*), which may also be relied on, would have been to the purpose, if in this case the advances had been made without any view to the granting of an annuity. The same observation applies to *Hall* v. *Lach.* (*b*) [*Cresswell,* J. What particular annuity was agreed upon in the first instance here?] An annuity equivalent to 11 *per cent.* upon the amount that might be advanced. [*Cresswell,* J. All must have been *paid* before the annuity could be granted. When the amount of the annuity was calculated, the parties must have calculated it upon money before then due, and actually paid.] The parties do not, as in *Kelfe* v. *Ambrosse,* agree to grant an annuity in consideration of an antecedent debt. In equity, the annuity would have been considered as an annuity existing prior to the execution of the deed. [*Maule,* J. Possibly, if the agreement had been for a *specific* annuity.]

A cheque, in pleading, is ordinarily described as "a draft or order in writing for the payment of money,

(*a*) 7 *T. R.* 551. (*b*) 1 *Exch.* 300.

called a cheque on a banker." (a) In the stamp-act, 55 G. 3. c. 184. sched. Part I., tit. *Bill of Exchange*, a "draft" is mentioned as synonymous with "cheque." So, in the 9 G. 4. c. 49. s. 15., cheques are called drafts on bankers. In *Byles* on Bills (b), the definition is given without the learned author's usual accuracy,—"A cheque on a banker is, in legal effect, an inland bill of exchange drawn on a banker, payable to bearer *on demand*." In *Smith's* Mercantile Law (c), it is more correctly defined,—"A cheque is a bill of exchange addressed to a banker, and payable to a certain person or bearer,"—omitting the words "on demand." [*Wilde*, C. J. The author takes that for granted.] Dr. *Story*, in his treatise on promissory notes (d), says: "A cheque is a written order or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." And in § 490. he again says: "It has already been stated that cheques are payable immediately on presentment, without any days of grace. They are sometimes made, in terms, payable on demand; which language of course imports that they are payable immediately. But they are usually in *England*, and almost invariably in *America*, made payable without the addition of the words *on demand;* and then they are, in contemplation of law, equally payable on demand. It makes no difference in point of law, as between the parties (independent of the stamp-acts), whether a cheque be ante-dated or post-dated: it is still payable on its presentment, at any time after the

(a) See 2 *Chitty, Pl.* 7th edit. pp. 99, 100.

(b) 6th edit. p. 10.

(c) 4th edit., by *Dowdeswell*, p. 188 (a).

(d) 2nd edit. § 487.

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date. But a case may be supposed, of a cheque drawn on a bank, payable on a specified day, as, for example, it may be dated on the 1st day of *January*, 1845, and be made payable, in terms, on the 10th day of the same *January*; and the question might then arise, whether it was payable on that very day, without any allowance of the days of grace.(*a*) The general understanding among banks is believed to be, that, in such a case, the cheque is payable on the 10th day of *January*, without grace, and it is treated as a cheque payable on demand on that very day. In any other view, the cheque might be presented for, and require, acceptance; and yet it is understood that such acceptance is never called for or given."

Part of the consideration here is stated to be work and labour and goods sold and delivered,—not saying when the work and labour was done or the goods delivered. If it was necessary to state the particulars of the cheques, it was equally necessary to state when the work was done and the goods delivered.

Bovill (with whom was *Byles*, Serjt.), in support of the rule. The foundation upon which all the cases relied on upon the other side, rest, is this,—that the statement in the memorial, confirmed by the deed, is simply of an acknowledgment of a cheque or draft having been given at the time of the grant of the annuity, and not of its having previously been paid. A further distinction between those cases and the present, is, that, in all of them, the thing is described as a draft on a banker, or a draft payable at a banker's, which is ambiguous; whereas, here, the description is "a cheque," which in ordinary understanding is an instru-

(*a*) Citing the case of *The Mohawk Bank* v. *Broderick*, 10 *Wend. R.* 304., *S. C.* 13 *Wend. R.* 133.

ment payable on demand. In *Rumball* v. *Murray*, the consideration was erroneously stated to be in *money*, whereas it was given by a banker's cheque and a promissory note; in *Berry* v. *Bentley*, the consideration money was described to have been paid by a promissory note, drawn by *Hammersley*, and payable at *Hammersley, Morland*, & Co.'s, "which said sum so secured has been *since* paid,"—that is, after the grant of the annuity, and before the inrolment of the memorial; in *Poole* v. *Cabanes*, part of the consideration was stated in the memorial to be, a draft of a stranger on Messrs. *Lockharts*, bankers, in *Pall Mall*, "which said draft *was* duly honoured,"—that is, which had been duly honoured before the inrolment; *Drake* v. *Rogers*, again, was the case of a draft of a stranger on a banker, with an acknowledgment of the draft only, and not that it had been paid: and in *Abbott* v. *Douglas*, the consideration was stated to have been paid by "a draft of even date with the indenture, drawn by the grantee, on Messrs. *A. B.* & Co.," not saying when payable. On the other side, the authorities are precise and clear. In *Ex parte Michell* (*a*), the memorial was held good, the consideration being stated to have been paid in money, though part of it was paid by means of a banker's cheque, the value of which had been actually received by the grantor some time before the execution of the deeds. *Berry* v. *Bentley* and *Poole* v. *Cabanes* having been cited there, *Grose*, J., said: "All the prior cases in which it has been deemed necessary to set out in the memorial the payment of any part of the consideration money by bankers' cheques (where such has been the fact), have been where the cheque was delivered as payment at the time of executing the deeds, when *non constat* it would ever be paid. But here the

(*a*) 2 *East*, 137.

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money had been actually received upon the cheque a month before by the grantor; therefore, at the time of such execution, the consideration might well be stated to be so much money paid to her." In *O'Callaghan* v. *Ingilby*(a), Lord *Ellenborough* says: "It has been determined by several cases, that, where the consideration was not paid in money, but by a draft, the particulars of that draft must be set forth; as in *Rumball* v. *Murray*, *Berry* v. *Bentley*, *Poole* v. *Cabanes*. And it is equally clear, that, if paid by a draft *converted into cash before the execution of the deeds*, the particulars of the draft need not be stated." In that case, the consideration was stated to have been paid at or before the sealing and delivery of the annuity-deed, by a draft of the grantee on his bankers; and it was held that these statements did not necessarily import, that, at the time of executing the deeds, the *drafts* only but not *the money* had been paid to *Morland* and *Hammersley*. Here, the consideration is stated to be a sum of money due and owing from the grantor to the grantees at the time of granting the annuity, as follows, — 1882*l.* 3*s.* 6*d.* for work and labour and for goods sold and delivered, and 1303*l.* 18*s.* 9*d.* for money lent and advanced, and interest thereon, in the sums, and at the times, mentioned.

The consideration being a pre-existing debt, the case is not within the annuity act at all; and no memorial was necessary. In *Kelfe* v. *Ambrosse*(b), it was held that money lent and paid at different times for the education and advancement of the defendant, was a good consideration for the grant of an annuity, within the 17 *G.* 3. *c.* 26. *s.* 3.; and that such a consideration was sufficiently expressed in the deeds for securing the annuity, under the description of "money lent and ad-

(a) 9 *East*, 135. 148. (b) 7 *T. R.* 551.

vanced, and also paid, laid out, and expended to and for the maintenance, education, and advancement in the world of the defendant." *Grose*, J., there says: "The objection is, that it should have been set forth when the different sums of money were paid; to support which, cases have been alluded to, in which it was ruled that the names of the persons by whom the consideration was paid should be set forth; but what was determined in the latter class of cases, ought not to be applied to such a case as the present, where the grantor himself admitted that the consideration was an antecedent debt due from him to the grantee, arising from different sums paid at different times for his use. It would be extending the act of parliament too far, to decide that this annuity could not be supported, merely because the respective times when these different sums of money were advanced by the grantee are not mentioned, when every thing that passed at the time of granting the annuity is sufficiently set forth." So, in *Hall* v. *Lack*(a), the plaintiff had advanced to the defendant several sums, amounting to 5000*l.*, less the sum of 250*l.*, which *C.*, the agent of both parties, improperly retained without the authority or knowledge of the plaintiff; and *C.* received five bills of exchange, accepted by the defendant, to the amount of 5000*l.*, by way of security: the dates of the bills did not exactly correspond with the dates of the advances, nor were the advances in the exact sums for which the bills were given. The plaintiff accepted an annuity from the defendant, in satisfaction of the bills and the 5000*l.* secured thereby. The memorial, under the head "Consideration, and how paid," was to this effect,—"5000*l.* made up of five several sums of 300*l.*, 200*l.*, 2000*l.*, 1500*l.*, and 1000*l.*, previously lent and advanced by

(a) 1 *Exch.* 300.

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the plaintiff to or for the use of the defendant and *E. J. Lack* (the defendant's son), and owing to the plaintiff on security of five several bills of exchange drawn by *E. J. Lack* upon, and accepted by, the defendant, and indorsed by *E. J. Lack*, the said consideration being paid or satisfied by the cancellation of the said bills; and a release by the plaintiff of the defendant and *E. J. Lack* from the sum secured thereby, and interest." It was held that the memorial was sufficient; for, that it is not necessary, in the case of existing by-gone debts, to state how each sum constituting the debt, was advanced. It may be conceded, that, if the debt be contracted with the view to the purchase of the annuity, a memorial is necessary. It may also be conceded, that, in 1838, these parties entered into an agreement for the granting of *an* annuity: but it is equally clear that the annuity now under consideration, was not granted in pursuance of *that* agreement. [*Maule*, J. You say that the original agreement was put an end to, and a new one entered into.] Yes. The original bargain was, that the *whole* debt should be converted into an annuity. Here, the annuity was granted for a *part* only of the debt. *Marriage* v. *Marriage*(*a*) is also an authority to shew that an annuity granted for a by-gone consideration, is not within the annuity-acts. With regard to the work and labour and goods sold, there is nothing in the statutes to require the times at which the work was done or the goods delivered, to be stated in the memorial.

WILDE, C. J. I had not the advantage of hearing the argument of Mr. *Whateley*(*b*); but I have heard

(*a*) *Antè*, Vol. I. p. 761.

(*b*) His lordship was, on the day upon which that part of the argument took place, presiding in the court of Criminal Appeal. Mr. Justice *Cresswell* was also absent on that day, for the like reason.

Mr. *Brown*, who has exhausted the subject. It seems to me that the rule for entering a nonsuit must be made absolute: in other words, that the annuity is a valid annuity, and the memorial sufficient. The objection which was made to the memorial, was, that it does not strictly comply with the statute, in stating the "consideration, and how paid." It appears to me, however, that the statement is sufficient: it is thus: —"3000*l.*, part of a sum of 3186*l.* 2*s.* 3*d.*, due and owing from the said *Joseph Samuel Church* to the said *Edmund Pontifex* and *William Pontifex*, at the time of granting the said annuity, as follows:—The sum of 1882*l.* 3*s.* 6*d.* for work and labour and for goods sold and delivered, and the sum of 1303*l.* 18*s.* 9*d.*, for money lent and advanced, and *interest thereon*, in the sums and at the times following." The objection is confined to this latter sum, of 1303*l.* 18*s.* 9*d.*, for money lent, and interest; the mention of the interest rather tends to exclude all doubt as to the moneys having been *previously* advanced. The memorial then proceeds to state the sums and the times of lending, thus:—"The sum of 250*l.* paid by the cheque of the said *Edmund Pontifex* and *William Pontifex*, on, and dated, the 29th *December*, 1837, and drawn in the then name of their trading firm of *William Pontifex*, Sons, & *Wood*, on Messrs. *Smith*, *Payne*, & *Smith*, their bankers." The date, as it seems to me, is to be referred to the period at which the money was lent and advanced. The memorial then proceeds,—"The further sum of 500*l.*, paid by a like cheque, dated the 24th of *February*, 1838,"—omitting the statement that it was *paid on* that day; but that statement in the first instance was wholly unnecessary. It then goes on,—"The further sum of 23*l.* 10*s.*, paid by a like cheque, dated the 28th of *February*, 1838; the further sum of 270*l.*, paid by a like cheque, dated the 25th of *July*, 1838, drawn in

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the then name of the trading firm of *E.* & *W. Pontifex* & *Wood;* the further sum of 200*l.*, paid by a like cheque as last mentioned, dated the 11th of *January*, 1839; interest on the above sums respectively up to the 27th of *April*, 1839, 60*l.* 8*s.* 9*d.*" The effect of this statement is, that the several sums were paid, by cheques, on the days on which those cheques respectively bear date. One question which has been raised, is, as to what is the import of a statement of a payment "by cheque." The general understanding, I take to be, that it imports an instrument payable on its date; for, every cheque properly purports to be drawn on the day of its date; and we are not to assume that a false date is given to it. Looking, therefore, at this memorial, it can hardly be doubted that the parties meant to state the exact days of payment of the several sums. There is no suggestion that any fraud upon the act of parliament was contemplated; and, applying to this memorial a fair and reasonable construction, I think it professes to set forth truly and correctly the sums in which, and the times when, the consideration money was advanced, and therefore that the objection fails.

Further, I think, that, inasmuch as the annuity in question was granted for a by-gone consideration, an antecedent debt, no memorial at all was necessary. How stand the facts? There was an agreement between the parties in *February*, 1838, that certain work should be done and certain moneys advanced by Messrs. *Pontifex* for Mr. *Church*, and that the latter should, in consideration of that work and those advances, grant to the former an annuity at the rate of 11 *per cent.* upon the amount, when such amount, which was necessarily uncertain at that time, should be afterwards ascertained. The work being completed, and the accounts between the parties adjusted, it appears that there is a balance due to Messrs. *Pontifex*, of 3186*l.* 2*s.* 3*d.*, comprising 1882*l.*

3*s.* 6*d.* for work done and goods supplied, and 1303*l.* 18*s.* 9*d.* for cash advanced, and interest. What do the parties then do? Do they carry into effect the original agreement? I think not. They enter into a new agreement, to grant an annuity of 11 *per cent.* on 3000*l.*, the 186*l.* 2*s.* 3*d.* having probably been paid. It may be said that the difference is small: but that is immaterial. They agree,—and there is no suggestion that it was colourably done,—that 3000*l.* of what had been incurred in the manner before mentioned, should be considered as a debt due and owing,—and it is clear that work done and goods and money supplied in contemplation only of the grant of an annuity, could not constitute a debt due and owing,—and they come to a new agreement, that an annuity at 11 *per cent.* upon this sum of 3000*l.* shall be granted; just as, upon the determination of a lease, the parties sometimes come to an agreement for a new tenancy on the terms of the old lease. I think the whole had become a debt, the balance of which would have been recoverable upon an account stated, and that the annuity having been thus granted in consideration of an antecedent debt, no memorial need have been inrolled at all.

The rest of the court concurring,

Rule absolute for a nonsuit.

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Jan. 26.

The court will not make an order for payment of money directed by an award to be paid, so as to enable the party entitled to receive it to avail himself of the 1 & 2 *Vict. c.* 110. *s.* 18., except where the case is clear and free from doubt.

An action against a railway company was referred to arbitration. The arbitrator made his award on the 28th of *April*, 1849, — directing the company to pay to the plaintiff a certain sum, by four instalments, on the 12th of *June* and 26th of *November*, 1849, and the 26th of *February* and 26th of *May*, 1850. On the 4th of *May*, 1849, the Vice-Chancellor made an absolute order for the dissolution and winding up of the company, under the 11 & 12 *Vict. c.* 45., and an official manager was duly appointed. On the 1st of *August*, 1849, the 12 & 13 *Vict. c.* 108. passed, declaring that the former act should not apply to railway companies. Under these circumstances, the court refused to make an order upon the company (upon a service and demand upon the secretary and one of the directors,) to pay the instalments which had become payable on the 12th of *June* and 26th of *November*, 1849, considering the matter to be too doubtful to be disposed of on a summary application.

Quære, whether the joint-stock-companies-winding-up act, 1848 (11 & 12 *Vict. c.* 45.) applies to railway companies; and whether the joint-stock-companies-winding-up act, 1849 (12 & 13 *Vict. c.* 108.) is retrospective?

Quære, whether an attachment, or an order, can be obtained on non-payment of an *instalment*.

Attachment does not lie against a corporation (*e. g.* an incorporated railway company,) for non-performance of an award.

AN action having been brought by the plaintiff against the *Sligo and Shannon Railway Company*, to recover a large sum, which he claimed to be due to him for services rendered by him as engineer to the company; and the company having appeared and pleaded, it was agreed (by a judge's order dated the 2nd of *April*, 1849), that all matters in difference in the cause should be referred to an arbitrator; the costs of the action to abide the event of the award, and the costs of the reference to be in the arbitrator's discretion; and by the order it was directed, that, in case the arbitrator should make his award in favour of the plaintiff, any sum or sums of money which might be awarded to be paid to the plaintiff, should be awarded to be paid to him in manner following, that is to say, one fourth part of the

whole amount to be paid on the 12th of *June*, 1849, one third part of the whole amount on the 26th of *November*, 1849, and the balance by two equal payments, the first of such payments to be made on the 26th of *February*, 1850, and the other on the 26th of *May*, in the same year.

By his award, bearing date the 28th of *April*, 1849, the arbitrator adjudged and determined, that all further proceedings in the cause should thenceforth cease and be no further prosecuted; that there was due and owing from the said *Sligo and Shannon Railway Company* to the said *William Mackenzie*, in respect of plans, plates, engravings, and other causes of action in the declaration mentioned, the sum of 3320*l.*; that the said *Sligo and Shannon Railway Company* should well and truly pay, or cause to be paid, unto the said *William Mackenzie*, or Messrs. *Clutton, Cooper, & Ade*, his attorneys, for the use of the said *William Mackenzie*, at, &c., the sum of 3320*l.* of lawful *British* money, in full satisfaction and discharge of and for all matters in difference in the cause referred to the said arbitrator as aforesaid, in the manner following, that is to say, the sum of 830*l.*, being one fourth part of the whole amount of 3320*l.*, to be paid on the 12th of *June* next, the sum of 1106*l.* 13*s.* 4*d.*, being one third part of the whole amount of 3320*l.*, on the 26th of *November* next, and the sum of 1383*l.* 6*s.* 8*d.*, the balance, by two equal payments, the first of such payments, amounting to the sum of 691*l.* 13*s.* 4*d.*, to be made on the 26th of *February*, 1850, and the other, amounting to the like sum of 691*l.* 13*s.* 4*d.*, on the 26th of *May* in the same year; that, upon payment of the said sum of 3320*l.*, in manner aforesaid, the said *William Mackenzie* should, if required so to do, deliver to the said company, or their solicitors, all copper-plates, copper-plate engravings, and lithographed plans and sections, of or relating to

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the said railway, and then in the custody, possession, or power of the said *William Mackenzie;* and that the said company should pay, or cause to be paid, the costs of the reference.

The order of reference was made a rule of court on the 10th of *May*, 1849; and, on the 18th of *July*, the costs of the reference were taxed and allowed at 98*l.* 5*s.*

On the 4th of *May*, 1849, the Vice-Chancellor of *England*, upon the petition of certain directors of the company, ordered "that the said *Sligo and Shannon Railway Company* be absolutely *dissolved and wound up* under the provisions of the joint-stock-companies-winding-up act, 1848; and that it be referred to one of the masters of the court, in rotation, to wind up the affairs of the said company under the provisions of the said act."

On or about the 24th of *May*, the petitioners, under the direction of Master *Senior*, caused to be inserted in the *London Gazette*, and also in the *Times*, *Morning Chronicle*, and *Daily News*, a notice of the master's intention to appoint an official manager of the said company on the 7th of *June* then next, and also the following notice: —

"In the matter of the joint-stock-companies-winding-up act, 1848, and of the *Sligo and Shannon Railway Company*: —

"Notice is hereby given, that all parties claiming to be creditors of this company, are to come in and prove their debts before *Nassau William Senior*, the master of the high court of chancery charged with the winding up of the said company, at his chambers, *Southampton Buildings, Chancery Lane, London:* and, until they shall so come in, they will be precluded from commencing or prosecuting any proceeding for the recovery of their debts."

Accordingly, on the 7th of *June*, the master ap-

pointed *James Edward Coleman* to be official manager of the company: but neither the plaintiff, nor any person on his behalf, had come in and proved his debt before the master.

Upon an affidavit of the plaintiff, stating that he, on the 2nd of *January* instant, served *Abraham Gole*, who was, and still remained, the secretary of the company, duly authorised and acting in the affairs of the said company, at his residence at *Chelsea*, with a true copy of the rule of court of the 10th of *May*, 1849, and the allocatur thereunder written, and also a copy of the award, at the same time shewing him the originals, and demanded of him payment of the two instalments of 830*l.* and 1106*l.* 13*s.* 4*d.*, due respectively the 12th of *June* and 26th of *November*, 1849, and the 98*l.* 5*s.* costs, which sums he refused to pay; and also stating a similar service and demand upon *William Galt*, one of the directors of the company: and also an affidavit by the plaintiff's attorneys, negativing payment of the money to them or to either of them,

Crosy, on a former day in this term, obtained a rule calling upon the company to shew cause why they should not forthwith pay to the plaintiff, or to Messrs. *Chilton & Sale*, his attorneys, the several sums of 830*l.* and 1106*l.* 13*s.* 4*d.*, being the respective amounts of the first and second instalments directed by the award to be paid, and also the 98*l.* 5*s.* costs pursuant to the said award, rule, and allocatur.

Wordsworth appeared to shew cause on behalf of Mr. Coleman, the official manager.

Crosy insisted that it was not competent to the official manager to appear to oppose a rule like the rule, the appointment of an official manager presupposing the

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dissolution of the company; 11 & 12 *Vict. c.* 45. *ss.* 21, 22.; and he not being a party called upon by, or served with, the rule.

Wordsworth. Since the order for the dissolution and winding up of the company, the official manager is the only representative of the company. The 52nd section of the 11 & 12 *Vict. c.* 45. enacts, "that, where any action, suit, or other proceeding shall be pending against the company in respect of which such official manager shall have been appointed, or against any person authorised to be sued as the nominal defendant on behalf of such company, it shall be lawful for the plaintiff in such action, suit, or other proceeding, to substitute the official manager of such company, by such style or designation as hereinbefore mentioned, as the defendant in such action, suit, or other proceeding, by entering a suggestion on the roll to that effect in such action, and by obtaining an order to that effect in such suit, such order to be obtained on motion or petition, without notice; and that it shall be lawful for the plaintiff in such action, suit, or other proceeding, to prosecute the same thenceforward against the official manager, in the same manner, and with the same effect, to all intents and purposes, and to have the same benefit of any order, decree, judgment, or other proceeding previously made, obtained, and had, as if such action, suit, or proceeding had been commenced against the official manager as defendant under the provisions of this act." [*Maule*, J. The effect of that section is merely to give an *option* to the plaintiff.] The 73rd section enacts, that, after the first appointment of an official manager, no creditor or other person shall, except so far as the master shall permit, have power to commence, or to proceed with, any action against the official manager, *or against the company, or any other person representing the same*, or who is sued as

a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the master, as thereinafter mentioned; and that it shall be lawful for any judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after proof shall have been made, or exhibited, before the master." (a) [*Cresswell*, J. If you come here to say that the company does not exist, how can we hear you?] The company, notwithstanding its dissolution, still survives to a certain extent. [*Maule*, J. That is shewn by the 53rd section, which authorises the prosecution of pending actions on behalf of the company, in the name of the official manager. By what section is the company dissolved?] By the 14th and 16th, the former of which authorises the court of Chancery to make an absolute order for the dissolution and winding up, or for the winding up, of the company; and the latter of which enacts, "that, from the date of any order absolute for dissolution, or from any date to be therein fixed for that purpose, the company therein specified shall be absolutely dissolved." [*Maule*, J. The whole scope of the act shews that the company is not so dissolved as to be disabled from appearing for itself.] The order for the dissolution operates a complete suspension of all acts and proceedings by the company or any of its members or servants. The 57th section enacts, "that all judgments which shall be entered up in any action at law against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and

(a) A summons for that purpose had been taken out before the argument of the rule.

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shall be enforced in like manner, as if such judgments had been entered up against such company, or against any person duly authorised to be sued on behalf of the same." All these provisions, it is submitted, shew that the company can only be represented by the official manager, from the time of his appointment down to the final winding up of the affairs of the company. [*Wilde*, C. J. Upon whom was the rule served? *Creasy*. Upon the secretary and one of the directors.]

Wordsworth, admitting that he was instructed on behalf of the company, then proceeded to shew cause against the rule. The rule calls upon the company to pay two instalments of a sum awarded against them, and also the costs of the reference, and is objectionable on several grounds, — first, the company has been dissolved under the statute 11 & 12 *Vict. c.* 45., and therefore a service pursuant to the 135th section of the companies-clauses-consolidation act, 1845, 8 *Vict. c.* 16. (*a*), is not a good service, — secondly, assuming the company to be for some purposes a subsisting company, the order prayed by the rule is in the nature of an attachment, which does not lie against an incorporated company, who can only be made amenable by action or by *mandamus*, — thirdly, that, supposing an attachment will lie against an incorporated company, it will not lie for an *instalment*, — fourthly, that, assuming the company to be a subsisting company, and the remedy

(*a*) Which enacts that "any summons or notice, or any writ or other proceeding, at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post, directed to, the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the company."

properly prayed, there should have been a demand of the money on the official manager.

1. The service here was upon the secretary of the company, and upon one of the directors. The first winding-up act, 11 & 12 *Vict. c.* 45., received the royal assent on the 14th of *August*, 1848, the second, 12 & 13 *Vict. c.* 108., on the 1st of *August*, 1849. The dates of the proceedings in this case are as follows: — The order of reference was dated the 2nd of *April*, 1849. The arbitrator made his award on the 28th, directing the company to pay to the plaintiff 3320*l.*, by four instalments, the first, 830*l.*, on the 12th of *June*, the second, 1106*l.* 13*s.* 4*d.*, on the 26th of *November*, and the balance, 1383*l.* 6*s.* 8*d.*, by two equal payments, on the 26th of *February*, and the 26th of *May*, 1850. On the 4th of *May*, 1849, — after the making of the award, but before the time for payment of the first instalment, — the order absolute was obtained for the dissolution and winding up of the company under the first winding-up act; an official manager has been duly appointed; and the plaintiff has not proved his debt before the master, pursuant to the 73rd section of that act. The first question is, — what is the effect of the Vice-Chancellor's order? The 73rd section of the 11 & 12 *Vict.* c. 45. in terms prohibits any person from commencing or proceeding with any action against the company, or against any other person representing the company, without the permission of the master, until after proof of his debt or demand as therein provided. The rights of the parties in this case are not varied by the 12 & 13 *Vict. c.* 108., the 1st section of which enacts, amongst other things, that, "notwithstanding anything in the 11 & 12 *Vict. c.* 45. contained, importing a more limited application thereof, the same shall apply to all partnerships, associations, and companies, whereof the partners or associates are not less than seven in number, whether

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incorporated or unincorporated, and whether formed or subsisting before or after the passing of the said act or this act, other than, and except, railway companies incorporated by act of parliament, *to which companies such act shall not apply.*" The 38th section, however, which provides "that this act shall be taken and construed (so far as practicable) as a part of the said joint-stock-companies-winding-up act, 1848," shews that the provisions of the second act were not intended to override proceedings which had already been taken under the first act.

2. This is a proceeding in the nature of an attachment. [*Cresswell*, J. Rather, in substitution for it.] An attachment does not lie against an incorporated company. [*Wilde*, C. J. It is a mere personal remedy.] Precisely so. In *Corpe* v. *Glyn* (*a*), a dock company were authorised by statute to sue and be sued by their treasurer, but he was not to be liable in his own person or goods by reason of his being defendant in any such action; and all costs incurred by him in prosecuting or defending any action for the company, were to be defrayed out of the moneys applicable to the purposes of the act. Two actions between the treasurer and *Corpe*, in one of which the treasurer was plaintiff, and in the other defendant, were referred to an arbitrator, who awarded against the treasurer in both, with costs. The costs and damages being unpaid, and an attachment being moved for against the treasurer, — it was held, that he had not rendered himself personally liable by submitting to an order of reference: and the court refused an attachment, but ordered a *mandamus* to the treasurer and directors to pay the sums awarded. [*Wilde*, C. J. Does the plaintiff contend that an *attachment* will lie against this company? *Creasy*. No.

(*a*) *3 B. & Ad.* 801.

3. The same rules that are applicable to attachments, will apply to this proceeding. There have been numerous cases of motions for orders for the payment of money, to be rendered available under the 1 & 2 *Vict. c.* 110. *s.* 18.; and it has uniformly been held that the same strictness of service and other matters is necessary as in the case of a motion for an attachment: *Jones* v. *Williams* (*a*); *Neale* v. *Postlethwaite* (*b*); *Doe* v. *Amey* (*c*); *Kerr* v. *Jeston* (*d*); *Abrahams* v. *Taunton* (*e*); *Wilson* v. *Foster* (*g*); *Hawkins* v. *Benton* (*h*); *Dickenson* v. *Allsop* (*i*); *Winwood* v. *Holt.* (*k*) [*Williams*, J. All these cases only shew, that, to entitle you to an order under the 1 & 2 *Vict. c.* 110., you must take all the same preliminary steps that would be required to found a motion for an attachment; not that you can only obtain an order in cases where an attachment would be granted.] It is only in cases that are clear and free from doubt, that the court will entertain an application of this sort: *Spence* v. *Clarkson* (*l*); *Holcroft* v. *Manby.* (*m*) At all events, an attachment cannot be granted for an instalment: *Leveridge* v. *Forty* (*n*); *Atkinson* v. *Bayntun.* (*o*)

4. There has been no proper demand of the money: the affidavit states a service of the award, rule of court, and allocatur, and a demand of the money upon the secretary and one of the directors; whereas, it should have been, either upon the official manager, or upon the treasurer of the company, the person who, in the con-

(*a*) 11 *Ad. & E.* 175., 4 *P. & D.* 217.
(*b*) 1 *Q. B.* 243., 4 *P. & D.* 623.
(*c*) 8 *M. & W.* 565., 1 *Dowl. N. S.* 23.
(*d*) 1 *Dowl. N. S.* 340.
(*e*) 1 *D. & L.* 319.
(*g*) 6 *M. & G.* 149., 6 *Scott, N. R.* 936.
(*h*) 2 *D. & L.* 465.
(*i*) 13 *M. & W.* 722.
(*k*) 3 *D. & L.* 85.
(*l*) 1 *Dowl. N. S.* 837.
(*m*) 7 *M. & G.* 843., 8 *Scott, N. R.* 473.
(*n*) 1 *M. & Selw.* 706.
(*o*) 1 *N. C.* 444., 1 *Scott*, 404. But see *Cooke* v. *Whorwood*, 2 *Wms. Saund.* 337.

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templation of the act, has the custody of their money. The 135th section of the companies-clauses-consolidation act applies only to summonses, notices, writs, and rules of court, and not to *demands* of money, which appear to be omitted. The 50th, 90th, 91st, 109th, and 143rd sections of that statute seem to shew that the treasurer is the person upon whom the demand should have been made. [*Wilde*, C. J. (addressing *Creasy*). Is it the practice of the court to proceed by way of attachment, so as to preclude the discussion of that which may amount to a *bonâ fide* defence, or by rule calling upon a party to shew cause why he should not pay money?]

Creasy. It may be conceded that the plaintiff is bound to shew that the defendants will sustain no undue prejudice by this mode of proceeding. But, it is submitted that here the company could have no defence, if the plaintiff were to proceed to enforce the award by action. [*Maule*, J. Might they not set up the vice-chancellor's order?] Clearly not. The defendants cannot be prejudiced by this rule being made absolute: for, suppose an attempt were made to take any of their effects in execution under it, the question would then arise whether or not they had become vested in the official manager, by virtue of the vice-chancellor's order. He would not be concluded by the order of this court. The only object of this proceeding, is, to enable the plaintiff to proceed against shareholders; as a preliminary to which, he must obtain judgment and execution against the company: *Peart* v. *The Universal Salvage Company*. (a) [*Maule*, J. In truth, you wish us to decide a difficult question, upon motion, and so deprive the defendants of the means of reviewing our decision by a writ of error.] Undoubtedly, that would

(a) *Antè*, Vol. VI. p. 478., 6 *D. & L.* 322.

be the effect of this motion. Very grave doubts have been entertained, whether the joint-stock-companies-winding-up act, 1848, was ever intended to apply to railway companies: and, at all events, the Lord Chancellor seems to have had no difficulty in holding the 33rd section of the 12 & 13 *Vict. c.* 108. to be retrospective: *in re The North of England Joint-stock Banking Company* (*Sanderson's* case). (*a*) There, a motion, by way of appeal from a decision of a master, made under the winding-up act of 1848, was made to one of the vice-chancellors, and decided by him on the 7th of *July*. A notice of motion, by way of appeal from the vice-chancellor's decision, was given on the 8th of *August*, after the passing of the 12 & 13 *Vict. c.* 108. The motion was refused by the Lord Chancellor, on the ground of the notice of motion having been given more than three weeks after the decision of the vice-chancellor; and that the 33rd section (*b*) of the last-mentioned act, limiting the time within which notice of motion for a re-hearing must be given, applies to orders made under the winding-up act of 1848. [*Maule*, J. The court will only aid you in the way you ask, where the case is free from doubt. *Cresswell*, J. You must shew that the company is liable to an execution.]

WILDE, C. J. This rule asks for an order, upon which the plaintiff may proceed to judgment and execution against the property of the company. Now, it is contrary to the usual practice of the court, to give a

(*a*) 19 *Law Journ. N. S. Chan.* 122.

(*b*) Which enacts "that no notice of motion for a re-hearing before the Lord Chancellor of *Great Britain* or *Ireland* respectively of any order of the Master of the Rolls in *England* or *Ireland*, or of any of the vice-chancellors in *England*, under the said act or this act, shall be given after the expiration of three weeks after the order complained of shall have been made."

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party a summary remedy, which shall have the effect of shutting out a discussion upon the merits, where there exists a reasonable and well-founded doubt. I think this is not a case in which we ought to make the order prayed.

MAULE, J. I am of the same opinion. We might do great injustice if we granted this rule, and can do but little in refusing it, seeing that the plaintiff has still his remedy by action.

The rest of the court concurring,

Rule discharged, without costs.

STEAD v. ANDERSON.

Jan. 31.

A., a prisoner in the Queen's prison, in execution for the costs of a nonsuit, was, by an order of the insolvent debtors' court made *before* the passing of the 11 & 12 *Vict. c.* 7., directed to file a schedule of his property, debts, &c., pursuant to the 36th section of the 1 & 2 *Vict. c.* 110. *After* the 11 & 12 *Vict. c.* 7. came into operation, the keeper of the prison, pursuant to the directions for the classification of prisoners under the 2nd section of that act, removed *A.* to that part of the prison appropriated to first-class prisoners: — Held, that such removal was proper.

Semble, that, where a prisoner complains of an undue exercise of authority by the gaoler, his proper course is, to apply to the court, or a judge, by petition, for relief under the 32 *G.* 2. *c.* 28. *s.* 11., and not by *habeas corpus*.

THE plaintiff being in custody in execution at the suit of the defendant, for costs, and the defendant having on the 21st of *December*, 1847, obtained a vesting order under the statute 1 & 2 *Vict. c.* 110. *s.* 36., which order was, on the 23rd, served upon the keeper of the Queen's prison, and also upon the plaintiff, the plaintiff was, on the 4th of *July*, 1848 (he not having in the mean time filed a schedule, in obedience to the order), removed from that part of the prison in which he had before been detained as a prisoner of the third class, and placed in that part which, by the rules framed

by the secretary of state for the regulation and classification of prisoners, pursuant to the statutes 5 & 6 *Vict. sess.* 2. *c.* 22. and 11 & 12 *Vict. c.* 7., is devoted to first-class prisoners, which is composed of the three following descriptions of prisoners, viz. "First, debtors adjudged under the 77th, 78th, and 96th clauses of the 1 & 2 *Vict.* c. 110., as not entitled to the benefit of the said act, and to be discharged at some future period; secondly, *debtors refusing or neglecting to file a schedule of their property, when ordered to do so by the court for the relief of insolvent debtors*, under the provisions of the 36th section of the 1 & 2 *Vict. c.* 110.; thirdly, bankrupts against whom a warrant may be issued and lodged by the commissioners of bankruptcy, for fraud, or contempt of court."

Pashley, in *Michaelmas* term last, moved for a rule calling upon the keeper of the Queen's prison to shew cause why an attachment should not issue against him for the alleged improper detention of the plaintiff. The statute (11 & 12 *Vict. c.* 7. *s.* 2.) under which the regulation as to first-class prisoners is made, received the Royal assent on the 28th of *March*, 1848, which was after the making of the vesting order. Now, by an invincible rule of construction of penal statutes, the words "when ordered," must be limited to an order made after the passing of the act. Thus, Lord *Coke*, in his Commentary on the statute of *Gloucester*, *c.* 3., that, "if a man aliene a tenement that he holdeth by the law of *England* (*a*), his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover by writ of mortdauncestor, of the seisin of his mother, although the deed of his father doth mention that he and his heirs be bound to warranty," says (*b*): "This extendeth to alienations made *after* the

(*a*) *i. e.* as tenant by the curtesy.

(*b*) 2 *Inst.* 292.

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statute, and not *before*; for, it is a rule and law of parliament, that, regularly, *nova constitutio futuris formam imponere debet, non præteritis.*" In *Ashburnham* v. *Bradshaw* (*a*), there was a devise to charitable uses under a will in 1734; the testator lived till *July*, 1736, a month after the new statute of mortmain took place, and then died without revoking his will: it was referred by the court of Chancery to the judges for their opinion, whether this was a good disposition to charitable uses; and all of them certified that the devise to these uses was good in law, notwithstanding the act. So, in *Moon* v. *Durden* (*b*), it was held by the court of Exchequer (*dissentiente Platt*, B.), that the 18th section of the 8 & 9 *Vict. c.* 109., which enacts that "all contracts and agreements by way of gaming or wagering, shall be null and void, and that no suit shall be brought *or maintained* in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made," had not a retrospective operation, so as to defeat an action for a wager, commenced before the statute passed. In *Henderson* v. *Sherborne* (*c*), Lord *Abinger* says: "The principle adopted by Lord *Tenterden* (*d*), that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so." [*Maule*, J. There is no doubt that, in this country, the liberty of the subject is very much regarded and talked about, and that all statutes are to be so construed as to favour it

(*a*) 2 *Atkyns*, 36.
(*b*) 2 *Exch.* 22.
(*c*) 2 *M.* & *W.* 236. 239.
(*d*) In *Proctor* v. *Mainwaring*, 3 *B.* & *Ald.* 145.

rather than otherwise.] As to the remedy, — *Hawkins*, in treating of attachment, says (*a*): "There being scarce anything of this kind to be met with in the books, I shall only observe, that it seems clear, from the general reason of the law, which gives all courts of record a kind of discretionary power in the government of their own officers, that any such court may proceed in such manner against any such officer, not only for refusing to execute its commands, or *for executing them irregularly, remissly, or oppressively*, but also *for all kinds of oppression or injustice done by them in the execution of their offices*, or by colour of them." In 12 Co. 127., cited in Com. Dig. *Imprisonment* (I), is an instance of an indictment against a gaoler — "*quod ubi quidem* Robertus de Bayons de Tunelby *captus fuit, et in prisonâ Castri* London' *detentus pro quodam debito statuti mercatorii in custodiâ* Thomæ Botelier, *constabularii Castri de* London', *ubi ipse* Thomas le Botelier *posuit ipsum* Robertum *in profundo gaolo, inter lenones, et vili prisonâ, contra formam statuti, &c.* viz. *de* 1 Ed. 3., *et in eodem profundo detinuit quousque idem* Robertus *fecit finem cum eo de* 40*s.*, *quos ei solvit, et hoc per exactionem.*" And in *Co. Litt.* 260. a., it is said, that, "a man in prison by process of law, ought to be kept *in salvâ et arctâ custodiâ*, and, by the law, ought not to go out, though it be with a keeper, and with the leave and sufferance of the gaoler: but yet imprisonment must be *custodia, et non pœna*; for, *carcer ad homines custodiendos, non ad puniendos, dari debet.*" (*b*)

WILDE, C. J. There was a case in this court, of *Osborne* v. *Angle* (*c*), where this matter was discussed.

(*a*) *Hawk. P. C.*, Book 2. § 12.

(*b*) The case of the Canadian prisoners, *Leonard Watson* and others, 9 *Ad. & E.* 731., was also referred to.

(*c*) 2 *Scott*, 500.

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By a rule of *Hilary* term, 3 *G.* 2., the warden of the Fleet Prison was directed to provide a confined room or dungeon for the confinement of persons endeavouring to make their escape, or guilty of any other misdemeanor, — "that the general quietness and liberty of the rest of their fellow-prisoners may not be restrained or suffer thereby." A warrant from the Lord Mayor, for the apprehension, on a charge of forgery, of a prisoner in execution in the Fleet, being lodged at the door of the prison, the warden caused the party to be placed in the strong-room. A rule having been obtained, calling upon the warden to shew cause "why the defendant should not be restored to the proper and ordinary custody of the prison," I shewed cause; and, there being a good answer upon the merits, no discussion took place as to the form of the application. There may be some difficulty in granting a rule for an attachment in this case: but, still, the prisoner has a right to have the legality of his custody considered. If you think you can maintain a rule in the form adopted in *Osborne* v. *Angle*, probably it may be granted.

MAULE, J. In *Tidd*'s Practice (*a*), I find a statute set out which seems to provide for a case of this sort, — the 32 *G.* 2. *c.* 28., — the 11th section of which, "for the more speedy punishing gaolers, bailiffs, and others employed in the execution of process, for extortion, or other abuses in their respective offices and places," enacts, "that, upon *the petition*, in term time, of any prisoner or person being, or having been, under arrest or in custody, complaining of any exaction or extortion by any gaoler, bailiff, or other officer or person in, or employed in the keeping or taking care of, any gaol or prison, or other place, where any such prisoner or person under,

(*a*) 9th edit. p. 232.

or having been under, arrest, or in custody, by any process or action, is or shall have been carried, or in respect of the arresting or apprehending any person or persons, by virtue of any process, action, or warrant, or of any other abuse whatsoever committed or done in their respective offices or places, unto any of His Majesty's courts of record at *Westminster*, from whence the process issued by which any person who shall so petition, was arrested, or under whose power or jurisdiction any such gaol, prison, or place, is, or, in vacation time, to any judge of any such courts at *Westminster* from whence any such process so issued; or to the judges of assise, or justices of great sessions, in their respective circuits; or to the judge or judges of any other court of record where any prisoner or person being, or having been, under arrest or in custody, was arrested or in custody by process issued out of, or action entered in, any such other court of record within that part of *Great Britain* called *England*; every such court, judge of assise, and justices of great sessions, and judge and judges of all inferior courts of record, are hereby authorised and required respectively, within their several jurisdictions, to hear and determine the same in a summary way, and to make such order thereupon for redressing the abuses which shall, by any such petition, be complained of, and for punishing such officer or person complained against, and for making reparation to the party or parties injured, as they shall think just, together with the full costs of every such complaint; and all orders and determinations which shall be thereupon made by any of the said courts, or any of the said judges, justices of assise, justices of great sessions, judge or judges of any such inferior court as aforesaid, respectively, in such summary way as is herein prescribed, shall have the same effect, force, and virtue, and obedience thereunto may be enforced by the respective

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courts, judges, justices of assise, justices of sessions, judge or judges of any such inferior court, by attachment, or in any other manner, as other orders of the said respective courts, judges, justices of assise and great sessions, judge or judges of inferior courts of record, may be enforced." If that statute is still in force, the proper way of obtaining redress would seem to be by petition.(*a*)

Pashley intimated his intention to proceed in the way suggested; and accordingly, on the 26th of *November*, he read a note of a case with which he had been furnished by Mr. *Robinson*, of the Crown-Office: — "In the matter of *Henry Gompertz*, *Easter* term, 1837. Prosecutor had obtained several attachments against the defendant for *not answering* a bill in the Exchequer, &c., &c.; and application was made to the court of Queen's Bench for a rule calling on the marshal of the prison to confine the defendant (who had the liberty of the rules) *within the walls*. The defendant shewed for cause that the marshal had the discretion of giving the defendant the rules, or refusing them; and that the certificates of the defendant's medical men, as to his ill health, justified the marshal in allowing him to remain in the rules. But, *per curiam*. 'There is a manifest distinction between cases of debt, and criminal cases and cases for not answering. An attachment is a criminal proceeding: in such case, *this court, and not the marshal, must exercise their discretion on the special*

(*a*) See *Yorke* v. *Chapman*, 10 *Ad. & E.* 207., 2 *P. & D.* 493.; it was sought to restrain a prisoner from bringing an action of assault and false imprisonment against the marshal of the Queen's Bench Prison, on the ground that he ought to have proceeded, by petition, under the above statute: but the court held that the statute merely gave a cumulative remedy, and did not take away the common law right to proceed by action.

See *Ex parte William Cobbett*, *antè*, Vol. V. p. 418.

circumstances of the case.' And the rule was made absolute, to confine the defendant within the walls."

At the same time, he presented the following petition: —

"In the Common Pleas.

Between { *David Stead*, Plaintiff,
and
George Anderson, Defendant.

"To the Right Honorable Sir *Thomas Wilde*, knight, lord chief justice, and the Honorable the justices of Her Majesty's court of Common Pleas at *Westminster*.

"The humble petition of *David Stead*, the above-named plaintiff.

"Sheweth — That, judgment having been given for the defendant in this action, the said defendant, on or about the 5th of *October*, 1847, caused a writ of *ca. sa.* to be sued out in this action, and directed to the sheriff of *Middlesex*, against your petitioner, for 377*l.*, the defendant's costs in this action, and interest thereon; and that your petitioner was arrested by the said sheriff on the said writ, on the 9th of *November* in that year, and was, at his own instance, on the 25th of that month, delivered over by the said sheriff, on *habeas corpus cum causâ*, and committed to the Queen's prison, and there, then, and up to the time hereafter mentioned, was duly lodged as a prisoner of the class called Class 3. under the 5 & 6 *Vict. sess.* 2. *c.* 22.

"That, on the 4th of *July*, 1848, the said keeper removed your petitioner from out of the said division of the said Queen's prison, duly appropriated for the said third class, into the division appropriated for the first class, and has ever since detained him there, although your petitioner continued without any other cause of detention than the said commitment in execution; but the said keeper alleged, and alleges, that, the said

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defendant in this action having, on the 23rd of *December*, 1847, lodged at the prison a vesting order of your petitioner's estate, with a certain indorsement thereon, limiting a time for filing a schedule, and sued out of the court for relief of insolvent debtors by the said defendant, and your petitioner not having filed a schedule according to the said indorsement, your petitioner was and is a prisoner of the first class, from and after the passing of the 11 & 12 *Vict. c.* 7., intituled 'An act to amend an act consolidating the Queen's Bench, Fleet, and Marshalsea prisons, and for regulating the Queen's prison:'

"That, by the said last-mentioned act, the said first class of prisoners is composed of the three descriptions of persons following, that is to say, — First, debtors adjudged, under the 77th, 78th, and 96th clauses of the 1 & 2 *Vict. c.* 110., as not entitled to the benefit of the said act, and to be discharged at some future period, — Secondly, debtors refusing or neglecting to file a schedule of their property, when ordered to do so by the court for relief of insolvent debtors, under the provisions of the 36th section of the 1 & 2 *Vict. c.* 110., — Thirdly, bankrupts against whom a warrant may be issued and lodged by the commissioners of bankruptcy, for fraud, or contempt of court:

"That such removal was against your petitioner's consent, and on threats by the keeper, or his officers, of force, in case your petitioner refused to remove; and your petitioner solemnly protested against such removal, and has continued to remonstrate with him against such detention as a prisoner of the said first class, and frequently required the said keeper to allow him to remain or be in the said division for Class 3., being the general prison to which prisoners are committed on *habeas corpus;* and, particularly, your petitioner, on the 26th of *September,* 1848, applied to the said keeper, or his proper officer in attendance, and in his place, by notice

in writing, whereby your petitioner demanded of him, within the space of six hours after making that demand, a true copy of the warrant or warrants of your petitioner's commitment and detainer in the criminal side and separate division of the Queen's prison appointed for prisoners of the first class, being prisoners confined for other causes than for debt; and that the clerk of the papers of the said Queen's prison sent your petitioner an answer in writing, to the said demand, as follows: — 'The Queen's prison is not a criminal prison, and *David Stead* is not confined or imprisoned therein for a criminal, or supposed criminal, offence. *David Stead* is confined or imprisoned for debt, and can have a copy of the causes of his detainer, by paying the authorised fee of 3*s.* 6*d.*'

"That the said keeper has not in fact any warrant whatever for such removal and detention of your petitioner as a prisoner of the said first class, but acts on his own surmise of the law and fact that your petitioner was so ordered as described in the last-mentioned act of parliament; and your petitioner believes that such surmise is only founded on his, the keeper's, own reading and considering a duplicate copy left with him of the said vesting order and indorsement; and, with respect to the law and fact of your petitioner's so refusing or neglecting, he admits that he has no warrant whatever thereof, but requires your petitioner to produce to him a certificate from the said court that he has filed a schedule:

"That the aforesaid division appropriated to the said third class, being the general prison aforesaid, is a large and comparatively well-accommodated place and habitation, and comprises the far greater part of the original prison, from which the division of the said first class, and a division for confinement of persons under sentence of criminal courts, are small wards; and the

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persons confined in the said first class are in fact effectually cut off from communication with the persons in Class 3.; and that iron bars are affixed to the windows of the Class 1.; and the only place for air and exercise of the said class, is, a narrow dark court-yard, of about one tenth the area of the space enjoyed by Class 3.; and that your petitioner has suffered greatly in his health by such further confinement in such narrow prison of punishment, and he feels that his constitution, which was before very excellent, cannot long hold out in such confinement.

"Your petitioner, therefore, humbly prays your lordships to hear and determine the same petition in a summary way, and to make an order thereupon for redressing the abuses by such petition complained of, and for making reparation to your petitioner, as your lordships shall think just, together with the full costs of such complaint. "And your petitioner will ever pray, &c.

(Signed) "*David Stead.*"

This petition was accompanied by the following affidavit of the prisoner: —

"*David Stead*, a prisoner in the division appropriated for prisoners of the first class in the Queen's prison, the above-named plaintiff, maketh oath and saith, that the name '*David Stead*' to the petition hereto annexed, is in the proper handwriting of this deponent; that all the allegations of this deponent as such petitioner in the said petition, are true; that the paper writing hereto annexed, marked A. (*a*), is a true copy of his copy of

(*a*) The copy of causes stated that the defendant had been committed in execution upon a *habeas corpus* on the 25th of *November*, 1847, the return to which stated that he had been taken under a *ca. sa.* on the 9th of that month, at the suit of *Anderson* "for 377*l.* costs and charges in the said suit mentioned;" and that "on the 23rd of *December*, 1847, an order of the court for relief of insolvent debtors was

causes furnished to him on the 25th of *November* last, since which no alteration has taken place in his causes of detention; that the printed book of regulations of the said Queen's prison, and purporting to be approved and signed by Sir *George Grey* on the 17th of *June*, 1848, and to bear thereon the seal of the said Queen's prison, now shewn to this deponent, marked B., is a true copy of the regulations in force on the 4th of *July*, 1848; and this deponent verily believes the same is a true copy of the regulations made by the said Sir *George Grey*, as secretary of state, under the acts of parliament in that case made and provided, 'for regulating the Queen's prison,' and the same regulations have remained, and remain, in force there, and no other regulations have been made, or are in force there, from or since the said 4th of *July*, to the best of the knowledge and belief of this deponent."

On the same day,

Pashley moved that the plaintiff might be discharged out of custody, under the 48 *G.* 3. *c.* 123., which enacts that all persons in execution upon any judgment obtained in any court, &c., for any debt or damages not exceeding 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged, may, upon application for that purpose, in the manner therein mentioned, be forthwith discharged out of custody as to such execution, by the rule or order of such court. Although that statute, *in terms*, applies to defendants only, yet, being remedial, it has been held,

left with the keeper, made upon the petition of *Anderson*, vesting the real and personal estate of the plaintiff, in the provisional assignee for the time being, &c."

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in *Roylance* v. *Hewling* (*a*), to apply to a plaintiff in execution for costs of a nonsuit: and, though some doubt seems to have been thrown upon that case in *Tinmouth* v. *Taylor* (*b*), yet it was acted upon in a later case of *Bradley* v. *Webb*. (*c*) The damages in the action in which these costs were incurred, could only have been 40*s*.

MAULE, J. The cases all treat the costs as a judgment-debt. The plaintiff here cannot, in any sense, be said to be in execution upon a judgment for a debt not exceeding 20*l*.

The rest of the court concurring,

This rule was refused.

W. H. Watson and *Unthank* were now heard on behalf of the keeper of the Queen's prison, in opposition to the plaintiff's petition. The 17th section of the 5 & 6 *Vict. c.* 22. enacted that prisoners in the Queen's Prison should be classed thus,—"1. Debtors remanded by the commissioners of the court for the relief of insolvent debtors, on the ground of fraud, or for refusing to file a schedule of their property; 2. Debtors who do not maintain themselves, and are not included in the first class; 3. Debtors who do maintain themselves, and are not included in the first class; 4. Prisoners committed for libel; 5. Prisoners committed for assault; 6. Prisoners committed by courts-martial; 7. Prisoners not included in one of the foregoing classes. And that it shall be lawful for the secretary of state to make separate rules for each class of prisoners; and that, as far as the construction of the prison will allow thereof, the prisoners of each class shall be sepa-

(*a*) 3 *M. & Selw.* 282.
(*b*) 10 *B. & C.* 114., 5 *M. & R.* 44.
(*c*) 7 *Dowl. P. C.* 588.

rated from each other, and especially the debtors from the prisoners confined for other causes than for debt." The 11 & 12 *Vict. c.* 7. *s.* 1. recites that part of the 17th section of the former act which relates to first class prisoners, and that "doubts have arisen as to the construction and application of so much of the above-recited act as sets forth the description of such debtors as shall be comprised in the first class," and repeals that provision: and the 2nd section enacts "that, from and after the passing of that act, the first class of prisoners in the Queen's prison shall be composed of the three following descriptions of persons, *viz.* First, debtors adjudged, under the 77th, 78th, and 96th clauses of the 1 & 2 *Vict. c.* 110., as not entitled to the benefit of the said act, and to be discharged at some future period: Secondly, *debtors refusing or neglecting to file a schedule of their property, when ordered to do so by the court for the relief of insolvent debtors,* under the provisions of the 36th section of the 1 & 2 *Vict. c.* 110.: Thirdly, bankrupts against whom a warrant may be issued and lodged by the commissioners of bankruptcy, for fraud or contempt of court." The vesting order in this case, which was obtained upon the petition of *Anderson,* was lodged on the 23rd of *December,* 1847. The 11 & 12 *Vict. c.* 7. passed on the 28th of *March* in the following year. It will be contended on the other side, that the 11 & 12 *Vict. c.* 7. is not retrospective, and therefore does not apply to the plaintiff. That statute, however, merely describes a class of prisoners, to one of which the plaintiff belongs, as a "debtor refusing or neglecting to file a schedule of his property, when ordered to do so by the court for the relief of insolvent debtors." The refusal and neglect is a continuing contempt of court from the time of the making of the order, thenceforward. [*Maule,* J. Can a man be imprisoned for refusing or neglecting to file a schedule, unless he has

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been brought up, and committed by the court for not doing so?] There is no clause in the act authorising the commissioners to have the prisoner brought up, or to commit him, for such refusal or neglect. By the 69th section, it is provided that the prisoner shall, within fourteen days next after the making of the vesting order, or next after notice in writing of such order having been made shall have been given to him, in case such order shall not have been made on his own petition, or within such further time as the court shall think reasonable, deliver in to the court a schedule of his debts, property, &c.: and, by the 70th section, the court is impowered to appoint a time and place for bringing up the prisoner, *after his schedule has been filed.* [*Cresswell*, J. The court has no power to compel him to file a schedule, if he chooses to take the consequences of his default.] None. (*a*) [*Wilde*, C. J. How does the gaoler know whether the party has been

(*a*) In *Cooke*'s Practice of the Insolvent Court, 2nd edit., p. 28, it is said: "There is no specific penalty, beyond commitment to close custody in the county gaol, for contempt under the 66th section*, denounced as attaching to a prisoner's neglect or refusal to obey this order of the court, requiring him to file a schedule; but the provisional assignee is impowered at once to take possession of the debtor's property of every nature and description. It was, perhaps wisely and considerately, thought by the legislature, that close imprisonment, with forfeiture of all property, was punishment enough for this offence."

* The 66th section of the 1 & 2 *Vict. c.* 110. enacts, "that, in case any assignee *or other person* shall disobey any rule or order of the said court, duly made by the said court for enforcing the purposes and provisions of this act, or made and entered into by the consent of such assignee or other person for carrying into effect the purposes and provisions of this act, it shall and may be lawful for the said court to order the person so offending to be arrested and committed, as for a contempt of the said court, to the prison of the Queen's Bench, or to the common gaol of any county, city, or place where he or she shall be, or where he or she shall usually reside, there to remain without bail or mainprize until such person shall have fulfilled the duty required by the said recited acts or this act, or until the said court shall made order to the contrary."

guilty of neglect or not?] He derives his information from the court.

Pashley, in support of the petition. The 11 & 12 *Vict. c.* 7. repeals the 5 & 6 *Vict. c.* 22. *s.* 17. so far as it relates to first class prisoners; and the 2nd section of the repealing act can only apply to future offenders,—"when ordered so to do," clearly cannot mean "who may heretofore have been ordered so to do," which is the construction contended for on the other side. The insolvent could not be said to be in default, or, at all events, the keeper of the prison could not know the fact, unless he had been brought up before the insolvent court, and committed for not doing what that court clearly had the power to order him to do. [*Maule*, J. You say that the new act will not apply where the order is made before, and the default or disobedience takes place after, its passing?] Yes. [In further support of his argument *Pashley* referred to the authorities before cited, *viz.* 2 Inst. 292., *Ashburnham* v. *Bradshaw*, and *Moon* v. *Dunden*; and particularly to the judgment of *Rolfe*, B., in the last-mentioned case.]

WILDE, C. J. This case appears to me to be free from difficulty; and the construction to be put upon the statutes referred to, seems to me to be plain and obvious. By the 36th section of the 1 & 2 *Vict. c.* 110. it is provided, that, if any prisoner who shall have been committed to any prison or gaol, and charged in execution for any debt, damages, or costs, &c., shall not, within twenty-one days, make satisfaction to the creditor at whose suit he shall have been so committed or charged in execution,—it shall be lawful for the creditor to apply, by petition, to the court for an order vesting the estate and effects of such prisoner in the provisional assignee; and the party or parties present-

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ing such petition, shall thereby state that he or they is or are desirous that such prisoner should be ordered to file a schedule of his property according to the provisions of this act, and should thereupon be brought up before the said court, to be dealt with according to the provisions of the act; and the said court shall and may require such prisoner to file his schedule, and shall and may cause such prisoner to be brought up to be dealt with according to the act, and all things to be done thereupon, or preparatory thereto, as in other cases according to the act. Section 37. vests the prisoner's estate and effects in the provisional assignee, immediately upon the filing of such petition, and the evidence in support thereof. The 69th section enacts, that every prisoner whose estate shall, by an order to be made under the act, be vested in the provisional assignee of the said court for the relief of insolvent debtors (whether upon his own petition, or on the petition of any such creditor as aforesaid), shall, within fourteen days next after such order shall have been made, or next after notice in writing of such order having been made shall have been given to him, in case such order shall not have been made on his own petition, or within such further time as the said court shall think reasonable, deliver in to the said court a schedule of his debts, property, &c. The 70th section enacts, that the said court for the relief of insolvent debtors, shall forthwith, *after such schedule shall have been filed as aforesaid in the said court by such prisoner*, appoint a time and place for such prisoner to be brought up before such court, &c., to be dealt with according to the provisions of the act. The 71st section provides for the giving of notice to the creditors; and some subsequent sections regulate the mode of proceeding at the hearing. These several clauses form a series which seem to me to be perfectly intelligible, shewing that, if the debtor

does not himself proceed to give his creditors the benefit of the act, the creditors may call upon the court to exercise its jurisdiction, and vest the property in the official assignee. The debtor having filed a schedule in obedience to the order of the court, and a day having been appointed for the hearing, the insolvent may be brought up, and dealt with as in the case of a petition presented by himself. But it no where seems to be contemplated, that the insolvent is to be brought up to be examined or dealt with in any way before he has filed such schedule. The act names a certain time for filing the petition, but superadds a power of extension, the mode of obtaining which extension is pointed out by the rules and practice of the court. Now, the 11 & 12 *Vict. c.* 7. *s.* 2., the object of which seems to have been merely to remove doubts as to the construction of the 5 & 6 *Vict. c.* 22., and not to relax any of its provisions, enacts that the first class of prisoners shall be composed (amongst others) of debtors refusing or neglecting to file a schedule of their property, when ordered so to do by the court for the relief of insolvent debtors, under the provisions of the 36th section of the 1 & 2 *Vict. c.* 110. Looking at the provisions of the insolvent act, there can be little doubt that the party is not to be brought up until after the filing of his schedule. The question is, whether the words "refusing or neglecting to file a schedule of their property, when ordered so to do by the court," mean that the refusal or neglect shall be a refusal or neglect to file a schedule which the party has been directed to file, by an order made subsequently to the passing of the 11 & 12 *Vict. c.* 7., or whether, the gaoler, finding him, at the time that act passed, in the position of having been guilty o the particular default, is not justified in placing him amongst the prisoners of that class, without waiting for a second order. I see nothing in the insolvent act

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rendering it necessary for the court to make any second order: and I cannot conceive that the legislature, in passing a statute having for its object the classification only, and not the punishment, of prisoners, should have contemplated the necessity of bringing up a prisoner, and a second time ordering him to do that which he had already been fruitlessly ordered to do. If they had so intended, they would doubtless have said it in plain and explicit terms. It appears to me that Mr. *Stead*, is a person in the condition contemplated by the statute, of having refused or neglected to file a schedule when ordered so to do by the insolvent court; and, therefore, that he has properly been removed to that part of the Queen's prison from which he seeks to be relieved. Whether the insolvent court had or had not power to make a second order, it is immaterial for us to consider, inasmuch as I think that none was necessary.

The rest of the court concurring,

Petition dismissed.

Watson asked for the costs to which the keeper of the prison had been put in opposing the petition.

WILDE, C. J. Applications of this sort ought not to be made, except upon reasonable grounds. As it does not appear to the court that there was reasonable ground for complaining of the conduct of the gaoler here, we think the prisoner ought to bear the costs of his speculative attempt.

Petition dismissed with costs.

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Jan. 28.

Distance, and the smallness of the amount of the plaintiff's claim, form no ground for refusing a writ in the nature of a *mandamus* for the examination of witnesses abroad, on behalf of the defendant, under the 1 *W.* 4. *c.* 22.

HUNTER, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why a writ in the nature of a *mandamus* should not issue, directed to the chief justice and the other judges of the Supreme Court of Judicature at *Sydney*, in *New South Wales*, commanding them to hold a court for the examination of *John Spinks* and such other witnesses on behalf of the defendant in this cause, and for receiving other proofs therein, pursuant to the statutes for that purpose made and provided (*a*), as may be within the jurisdiction of that court, and to perform all such matters and things as by the directions of the said statutes were required; and why the depositions to be thereupon taken, should not be transmitted, under the seal of the said court, to the masters of this court; and why the trial of this cause should not be postponed until the return of the said writ, or until the court shall otherwise order.

The motion was founded upon the affidavits of the defendant and his attorney (*b*), which stated that the action was brought for the recovery of 69*l.* 13*s.* 8*d.*, the balance alleged to be due from the defendant to the plaintiff, for wages as mate of the ship *Countess of Yarborough;* that issue was joined on the 27th of *December* last, and notice of trial given for the sittings after this term; that *John Spinks*, an officer in Her Majesty's Customs at *Sydney*, in *New South Wales*,

(*a*) 13 *G.* 3. *c.* 69., as to *India*, extended, by 1 *W.* 4. *c.* 22., to all the colonies.

(*b*) See *Healy* v. *Young*, *antè*, Vol. II. p. 702.

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and several persons, are now residing at *Sydney* aforesaid, who are material and necessary witnesses for the defendant, and without whose testimony the deponents were advised and verily believed that the defendant could not proceed with safety to the trial of the cause.

Haines now shewed cause. The granting a writ under these statutes is not a matter of course: the applicant must shew reasonable ground for it. [*Wilde*, C. J. *Primâ facie*, the party is entitled to have his witnesses examined, wherever they may happen to reside. It is for the party objecting, to shew some ground of objection.] In *Lloyd* v. *Key* (*a*), it was held, that, where a witness resides abroad, at such a great distance that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such a commission, on the application of the defendant. [*Maule*, J. The statutes contemplated that considerable delay would sometimes arise.] The 1 *W.* 4. c. 22. *s.* 1. provides that the power thereby given shall only be exercised "when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority thereby given will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for." Here, regard being had to the small amount of the plaintiff's claim, and the enormous expense of the writ, the granting it will amount to an absolute denial of justice. In *Cow* v. *Kinnersley* (*b*), the defendant was required to bring the money into court.

WILDE, C. J. I see no ground whatever for no allowing the writ to go in this case. In *Cow* v. *Ki*

(*a*) 2 *Dowl. P. C.* 253.

(*b*) 6 *M. & G.* 981., 7 *Sc N. R.* 892., 1 *D. & L.* 906.

nersley, the affidavit did not give the name of a single witness, nor did it even state that the defendant believed there were persons at *Bombay* who could give evidence in her favour. Here, however, the affidavits present all that the court has ever required. Let the writ be returnable on the 18th of *November* next.

The rest of the court concurring,

Rule absolute accordingly.

GADSDEN *v.* M'LEAN.

Jan. 31.

A *capias* is not grantable to hold the defendant to bail, in an action by the indorsee of a bill of lading against the master of the vessel, for a deceit in the representation in the bill of lading signed by him, that the goods were "shipped in good order and well conditioned."

The court ordered a bail-bond, which had been taken under a judge's order to hold to bail in such an action, to be delivered up to be cancelled.

A WRIT of summons having issued against the defendant at the suit of the plaintiff, in an action *on promises*, a judge's order for a *capias* to hold the defendant to bail, under the 1 & 2 *Vict. c.* 110. *s.* 3., was obtained, upon an affidavit by the plaintiff, to the following effect: —

That this action is brought to recover compensation in damages from the defendant for the loss sustained by this deponent under the circumstances hereinafter mentioned: that this deponent, on the 19th of *September*, 1849, entered into a contract in writing with *Thomas Melladew*, as agent of *James Scotland*, of *Memel*, merchant, for the purchase of about 3000 qrs. of good-conditioned oats, at 9*s.* 3*d. per* quarter, free on board at *Memel:* that, according to the custom of merchants in the said trade, this deponent was to pay for the oats to be shipped in pursuance of the said contract of purchase, by accepting the seller's drafts to be drawn

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upon him, on receipt of a bill of lading for the oats shipped according to the said contract: that, in pursuance of the said contract, and according to the aforesaid custom of merchants, this deponent was called upon by the said *Thomas Melladew*, as the agent of the said *James Scotland*, the seller of the said oats, to accept four bills of exchange, amounting together to the sum of 718*l.* 11*s.*, drawn by the said *James Scotland* upon this deponent, bearing date, respectively, the 19th of *November*, 1849, and payable at eight days after date thereof respectively, upon a bill of lading being produced to this deponent as the bill of lading of the pretended shipment of part of the oats sold to this deponent under the said contract, and which was signed by the above-named defendant as the master of the ship *Mercury*, and of which the following is a copy: —

"Shipped, by the grace of God, *in good order and well-conditioned*, by Mr. *J. Scotland*, in and upon the good ship or vessel called the *Mercury*, whereof is master, under God, for this present voyage, *A. M'Lean*, and now riding at anchor in this harbour, and, by God's grace, bound for *London*, to say, 1563, fifteen hundred and sixty-three quarters of oats, being marked and numbered as in the margin, and are to be delivered, *in the like good order and well-conditioned*, at the aforesaid port of *London*, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever, save risk of boats, so far as ships are liable thereto, excepted, unto order, or to assigns, he or they paying freight for the said goods as *per* charter-party, with primage and average accustomed: In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the

other two to stand void: And so God send the good ship to her desired port in safety.

"*Memel, Nov.* 19. 1849.

(Signed) "*Alex. M'Lean,* Master.

(Indorsed) "*James Scotland, Nov.* 19. 1849."

That this deponent was induced so to accept the said bills of exchange by the tender and delivery to him of the said bill of lading, and upon the faith and reliance that the oats therein acknowledged by the defendant to have been received on board his said vessel in good order and well conditioned, were accordingly in good order and well conditioned when shipped; and that, but for the delivery to him this deponent of a bill of lading containing such acknowledgment of the good order and condition of the oats when shipped, as aforesaid, this deponent would not have accepted the said bills of exchange, or either of them: that he, this deponent duly paid the amount of the said several bills of exchange so accepted by him as aforesaid, to the respective holders thereof, when they respectively arrived at maturity: that the *Mercury* arrived in the port of *London,* on the 8th of *December,* 1849; and that he, this deponent, went on board thereof on the 10th, and inspected the said oats shipped on board thereof, which are mentioned in the said bill of lading, and found the same to be in a very damaged state, from heating: that the mate of the said vessel admitted to this deponent, that the said oats were in a bad and heated state when they were received on board the said vessel at *Memel:* that, on the 12th of *December,* the deponent again went on board the said ship *Mercury,* and saw the defendant, and spoke to him on the subject of the said oats, and their damaged condition, when the defendant admitted that the said oats were out of condition when he the defendant took them on board his vessel, and that, if he had had a long voyage, the oats

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would before arrival only have been fit to be thrown away; that, if the said oats had arrived in good order and well conditioned, they would have produced such an amount, by the sale thereof, after payment of freight and all expenses, as would have fully reimbursed this deponent the amount of the said several bills of exchange so accepted and paid by this deponent in payment of the contract price for the said oats as aforesaid; but that, this deponent had had the said cargo of oats valued, and that the market value thereof, in their actual condition on arrival, was less, by the sum of 270*l.* and upwards, than the market value of the same oats if in good order and well conditioned: that, by reason of the premises, and under the circumstances herein set forth, he, this deponent, had sustained damage to the amount of the said sum of 270*l.* and upwards: that this deponent had caused payment of his said claim to be demanded from the said defendant, but that he had been unable to obtain payment of, or satisfaction for the same, or any part thereof: that the defendant's said vessel was then in the river *Thames*, and the deponent had been informed by Mr. *George Wedd*, of &c., merchant, that the defendant applied to him to charter the ship for *Alexandria*, and which information the deponent verily believed to be true, and the deponent verily believed that the defendant was negotiating a charterparty for *Alexandria* aforesaid, or for some other foreign port, and that the defendant was then about to take in his ballast, and that the ballast was then alongside the said ship, in order that he might proceed to such foreign port as soon as he should have arranged the terms of his charterparty; and the deponent verily believed that the defendant intended to leave *England* in a day or two, on his said voyage, and that he would so quit *England*, unless he were apprehended and held to bail: and that, unless

the defendant were so apprehended and held to bail, the deponent would be in great danger of losing the compensation in damages to which he is advised he is entitled from the defendant; and that he had caused a writ of summons to be issued out of this court against the defendant at the suit of him the deponent.

The defendant was arrested upon a *capias* issued pursuant to the judge's order, on the 26th of *December* last, and was discharged from custody on the 31st, upon giving a bail-bond to the sheriff.

Prentice, on a former day, obtained a rule calling upon the plaintiff to shew cause why the judge's order, and the *capias* issued in pursuance thereof, should not be set aside, and why the bail-bond should not be delivered up to be concelled, on the ground that the affidavit to hold to bail disclosed no cause of action. He submitted that the bill of lading is a mere contract between the shipper and the ship-owner; *Thompson* v. *Dominy* (*a*); and that the representation therein that the goods are shipped in good order and well conditioned, is not a representation made to an indorsee, whatever might be its effect as between the immediate parties to the contract.

Bovill now shewed cause. The first part of the rule cannot be sustained, all the materials which were before the judge at chambers not having been brought before the court; the defendant can only, at the most, have the bail-bond cancelled: *Needham* v. *Bristow*. (*b*) The question is, whether a good cause of action appears upon the affidavit upon which the defendant was held to bail. [*Maule*, J. Are we to try the existence of a

(*a*) 14 *M. & W.* 403.

(*b*) 4 *Scott, N. R.* 773., 1 *Dowl. N. S.* 700.

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cause of action, upon affidavit?] There is no difficulty as to the property in the goods passing by indorsement of the bill of lading: the only question is, whether the master incurs any responsibility when he makes upon the face of the bill of lading a representation which is false in fact, and false within his own knowledge. A host of cases, from *Pasley* v. *Freeman*(*a*) down to *Langridge* v. *Levy*(*b*) and *Pilmore* v. *Hood*(*c*), has settled the grounds upon which an action for deceit, in making false representations, is maintainable. *Howard* v. *Tucker*(*d*) has some bearing upon this case. There, goods being shipped in *India* for *London*, on account of a person there, the bill of lading was forwarded to him, and he indorsed it over for value. The bill of lading signed by the captain, stated the freight to have been paid in *Bengal*, but it was found, after the above transfer, that the freight never had been paid, through the default of the shipper. It was held that the ship-owners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading. If, in the present case, the plaintiff had not been deceived by the representation made by the master, he would not have accepted the bills drawn on account of the oats. [*Wilde*, C. J. The question is whether the affidavit discloses so clear and distinct a cause of action, as to justify the defendant's being held to bail.] Enough is shewn upon the face of the affidavit, to justify the order (the master having himself acknowledged that the oats were in a bad condition when shipped), and to cast upon the defendant the necessity of applying for his discharge under the 6th section of the 1 & 2 *Vict.*

(*a*) 3 *T. R.* 51.

(*b*) 2 *M. & W.* 519., *S. C.*, in error, *Levy* v. *Langridge*, 4 *M. & W.* 337.

(*c*) 5 *N. C.* 97., 6 *Scott*, 827.

(*d*) 1 *B. & Ad.* 712.

c. 110.: and, if so, the affidavits filed in opposition to this rule, abundantly answer the application.

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Channell, Serjt., and *Prentice, contrà*, were not called upon.

WILDE, C. J. The court is of opinion that the affidavit upon which the order for the *capias* in this case issued, does not disclose any good cause of action. The ground of the action is said to be fraud; but, to constitute fraud, it would be necessary to shew that the master had knowledge of the unsound state of the oats when they were shipped. All that the affidavit states in support of that charge, is, a conversation into which the master seems to have been not very fairly entrapped. Upon the whole, we think that remedy enough will be given to the defendant, by ordering the bail-bond to be delivered up to be cancelled, without costs.

Rule absolute accordingly.

WILLIAM ROBINSON *v.* EDWARD FRANCIS BURBIDGE (sued as EDWARD FRANCIS BURBRIDGE) and THOMAS WILLIAM O'KEEFE.

Jan. 31.

It is no objection to an order nisi to charge stock, pursuant to the 1 & 2 *Vict. c.* 110 *ss.* 14, 15., that it calls upon the judgment-debtor to shew cause *on a day certain.*

JUDGMENT having been signed on the 25th of *May*, 1849, against "*Edward Francis Burbridge*, and another," upon a warrant of attorney, in which the defendants were described as "*Edward Francis Bur-*

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bidge and *Thomas William O'Keefe*," the following order was obtained *ex parte*, in pursuance of the 1 & 2 *Vict. c.* 110. *ss.* 14, 15.: —

"*William Robinson* v. *Edward Francis Burbidge*, sued as *Edward Francis Burbridge*, and *Thomas William O'Keefe*.

Upon reading the affidavit of the plaintiff, I do order, that, unless cause be shewn to the contrary before me, or such other judge as shall be in attendance at the judges' chambers, *Rolls Gardens, Chancery Lane*, on *Monday*, the 14th of *January* instant, at 3 o'clock in the afternoon, by the defendant *Burbidge*, his attorney or agent, that the sum of 27,064*l.* 16*s.* 11*d.* Bank 3 *per cent.* Annuities, remaining on the credit of the cause of *Burbidge* v. *Burbidge*, pending in the high court of Chancery, in the name of the Accountant-General of that court, "The Legacy Account," shall be, and shall in the meantime stand, charged with the payment of the sum of 4000*l.* to the plaintiff, being the amount for which judgment has been recovered in this cause, and 3*l.* 10*s.* costs, and interest thereon, pursuant to the statute 1 & 2 *Vict.* c. 110.

"Dated, the 3rd day of *January*, 1850.

"*T. N. Talfourd.*"

On the 5th of *January*, *Burbidge*'s attorneys gave notice to the plaintiff's attorney that they would attend, by counsel, on the 9th, at 12 o'clock at noon, to shew cause against the above order. The plaintiff's attorney declining to attend on the 9th, pursuant to this notice, *Burbidge* appeared by counsel on that day before *Maule*, J., *for the purpose of shewing cause;* but that learned judge declined to hear him: and, on the 14th, the original order of the 3rd was made absolute, no one appearing to oppose it. On the 16th, these two orders were made a rule of court. On the 21st,

Whateley, on behalf of *Burbidge*, obtained a rule nisi to set aside the above orders and rule of court, with costs, on the grounds, that there was no such judgment as that mentioned in the first order, and that the order did not comply with the statute.

Humfrey now shewed cause. This court has no jurisdiction in the matter, be the order as bad as it may. In *Witham* v. *Lynch* (*a*), a judge at chambers having made an order charging an annuity payable out of the suitors' fund, by order of the lord chancellor, in pursuance of the provisions of the 46 *G.* 3. *c.* 128., the court of Exchequer, considering it doubtful whether or not the judge's order was valid, refused to set it aside, as, by so doing, they would deprive the party of the right of appeal. [*Cresswell*, J. The conclusion you draw from that case, is not warranted by the judgment of the court. *Maule*, J. Mr. Baron *Parke* expressly says that the court has a general jurisdiction, unless there be something in the context that is repugnant to that construction.] At all events, there is no ground for setting aside the order in question. [The court called on

Honyman to support the rule. The order was clearly bad. There is no judgment in a cause intituled as the judge's order is intituled: and these orders, being in the nature of writs of execution, must correspond with the judgment. The cases of *Reeves* v. *Slater* (*b*), *Fisher* v. *Magnay* (*c*), *Tagg* v. *Simmonds* (*d*), shew how strict the practice is in this respect.

The learned judge had no authority to make the order in the form in which it is framed: instead of

(*a*) 1 *Exch.* 391.
(*b*) 7 *B. & C.* 486. 1 *M. & R.* 265.
(*c*) 1 *D. & L.* 40.
(*d*) 4 *D. & L.* 582.

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limiting the defendant to a particular day for shewing cause, he should, according to the words of the 15th section, have afforded him the opportunity of coming to shew cause at any time within a given period,—"within a month," or "within six calendar months," as in *Fowler* v. *Churchill* (*a*) and *Morris* v. *Manesty*. (*b*) That the court has jurisdiction to entertain an application of this sort, is clear, from *Brown* v. *Bamford* (*c*) and *Witham* v. *Lynch*; though, in the latter case, some members of the court express themselves very guardedly.

WILDE, C. J. I am of opinion that this rule should be discharged. It seems to me that no sufficient objection to the order of my brother *Talfourd* has been pointed out. The statute which authorises the making these orders for charging stock (*d*), provides, that, unless the judgment-debtor shall, *within a time to be mentioned*

(*a*) 11 *M.* & *W.* 57.
(*b*) 7 *Q. B.* 674.
(*c*) 9 *M.* & *W.* 42.
(*d*) The 14th section of the 1 & 2 *Vict. c.* 110. enacts, "that, if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at *Westminster*, shall have any government stock, funds, or annuities, or any stock or shares of or in any public company in *England* (whether incorporated or not), standing in his name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment-creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof, respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment-creditor to all such remedies as he would have been entitled to, if such charge had been made in his favour by the judgment-debtor: provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order."

And section 15, "in order to prevent any person against whom judgment shall have been obtained, from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorised to be charged for the benefit of the judgment-creditor, under an order of a judge," further enacts "that

in such order, shew to a judge of one of the superior courts sufficient cause to the contrary, the said order

every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this act, shall be made, in the first instance, *ex parte*, and without any notice to the judgment-debtor, and shall be an order to shew cause only; and such order, if any government stock, funds, or annuities, standing in the name of the judgment-debtor, in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of *England* from permitting a transfer of such stock in the mean time and until such order shall be made absolute or discharged; and, if any stock or shares of or in any public company, standing in the name of the judgment-debtor, in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall, in like manner, restrain such company from permitting a transfer thereof; and that, if, after notice of such order to the person or persons to be restrained thereby, or, in case of corporations, to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then, and in such case, the corporation or person or persons so permitting such transfer, shall be liable to the judgment-creditor for the value or amount of the property so charged or so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment-debtor in the mean time shall be valid or effectual as against the judgment-creditor; and, further, that, *unless the judgment-debtor shall, within a time to be mentioned in such order, shew to a judge of one of the superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment-debtor, his attorney or agent, be made absolute:* provided, that any such judge shall, upon the application of the judgment-debtor, or any person interested, have full power to discharge or vary such order, and to award such costs, upon such application, as he may think fit."

And see the 3 & 4 *Vict. c.* 82. *s.* 1., which, reciting the 1 & 2 *Vict. c.* 110. *s.* 14., and that "doubts have been entertained whether the said provisions extend to the cases hereinafter mentioned," declares and enacts "that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stock, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and, when-

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shall, after proof of notice thereof to the judgment-debtor, his attorney or agent, be made absolute. It is contended that the proper construction of this provision is, that the order shall mention a certain space of time for shewing cause, and that it is open to the defendant to come in and shew cause at any moment he pleases, within that interval. The proposition is perfectly anomalous: the great inconvenience that would result from such a construction, accounts for its never having been suggested before. The obvious meaning of the statute is, that the order shall provide for cause being shewn within a certain and reasonable period; and, according to the invariable practice of the courts, such time must be a fixed time. If the time limited be an inconvenient one, the proper course for the defendant to adopt, is, to apply to the judge, upon a statement of the circumstances,

ever any such judgment-debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, or annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the court of Chancery, or the accountant-general of the court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or, shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment-debtor: Provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the accountant-general of the court of Chancery, or the accountant-general of the court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the governor and company of the Bank of *England*, or any public company, from permitting any transfer of such stock, funds, annuities, or shares, or payment of the interest, dividends, or annual payments thereof, in such manner as the court of Chancery or the court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment-creditor, with the amount of the sum to be mentioned in such order."

to vary his order in that respect,—that being a power which the judge possesses, in all cases, by the practice of the court. If the judge refuses to vary the order, I apprehend it is competent to the judgment-debtor to appeal to the court. Now, what has the party done here? The time mentioned in my brother *Talfourd*'s order for cause to be shewn, being the 14th of *January*, the judgment-debtor appears by counsel before another learned judge on the 9th, and asks, not to have the original order varied, but to be permitted to shew cause *ex parte*. The learned judge, however, declined to hear him. Instead of coming to the court to complain of that refusal, or (which would probably have been the better course) going to my brother *Talfourd*, and asking him to vary his order, the judgment-debtor lets the time for shewing cause go by, and then comes here to complain that the order did not comply with the terms of the statute. I think he has not succeeded in shewing any impropriety in the order, or that any injustice has been done. The objection is one of a strictly technical nature, and should be made out very clearly. I think my brother *Maule* did perfectly right in refusing to allow cause to be shewn at any other time than that mentioned in the order. And, moreover, I think the order was strictly in conformity with the act.

There is no pretence for the other objection. The judgment appears to have been properly signed in pursuance of the authority given by the warrant of attorney.

MAULE, J. I entertain no doubt that the court has jurisdiction, whether in the case of an order nisi or an order absolute; but, I agree with the court of Exchequer in *Witham* v. *Lynch*, that, where there is the slightest doubt, it is better to leave it to the chancellor to decide it. There is nothing in the 15th section of

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the 1 & 2 *Vict. c.* 110., as I conceive, to shew that there is any thing wrong in the frame of this order. If it had directed cause to be shewn "within next week," probably it would have done very well. Here, the order is "unless cause be shewn to the contrary on the 14th of *January* instant." The terms of this order expressly exclude a hearing in the interim. There is, then, a regular order, calling upon the judgment-debtor to shew cause on the 14th. He does not think proper to shew cause on that day: and therefore, I apprehend, the order was properly made absolute. The party has let slip the proper time for taking his objection.

CRESSWELL, J., signified his concurrence in the reasons above given.

WILLIAMS, J., had gone to chambers.

Rule discharged, with costs. (*a*)

(*a*) No objection was taken to the order, on the ground, that, while it contemplates the possibility of cause being shewn before the *same* judge by whom the order is made, yet no place, and apparently no time, is fixed for that purpose.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

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IN THE

COURT OF COMMON PLEAS,

AND UPON

WRITS OF ERROR,

IN

Hilary Vacation,

IN THE

THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO SAT *IN BANCO* DURING THIS VACATION, WERE—MAULE, J., CRESSWELL, J., WILLIAMS, J., AND TALFOURD, J.

HOWARD *v.* SHEPHERD.

Feb. 16.

The indorsee of a bill of lading cannot maintain an action upon the case for the non-delivery of the goods at the port of delivery.

THIS was an action upon the case against a ship-owner, for the non-delivery of goods pursuant to certain bills of lading.

The declaration stated, that the defendant was owner of a ship bound for *Bombay*, and received on board the same divers goods and merchandises, to wit, &c., then shipped on board thereof by *J. S.* to be carried by the defendant to *Bombay* for freight; that the master signed and delivered to *J. S.* two bills of lading, acknowledging the shipment of the goods, and undertaking to

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The declaration stated, that theretofore, and before the committing of the grievances thereinafter mentioned, the defendant was a merchant and ship-owner, and was possessed of a certain ship or vessel called the *Sophia Moffat*, bound for certain parts beyond seas, to wit, *Bombay:* That thereupon, to wit, on the 14th of *September*, 1847, the defendant received in and on board his said vessel divers goods and merchandise, to wit,

deliver them, at *Bombay*, to the order of *J. S.*, or to his assigns, for certain freight; that, at the time of the shipment of the goods, and of the signing and delivering of the said bills of lading, there was, and is, a custom amongst merchants, traders, and ship-owners at *London* and *Bombay*, that, when goods are shipped for conveyance on board ship for freight, and for and relating to which goods a bill of lading is signed and delivered to the shipper by the master, such goods are deliverable at the place in that behalf therein mentioned, by the master, to the *bonâ fide* holder, indorsee, and assign of the bill of lading, on production thereof by him, according to the terms thereof, and that the duty of the owner of such ship by whose captain and servant such bill of lading hath been so signed and delivered, is, to deliver the goods, at the said place, to the *bonâ fide* holder, indorsee, or assign of such bill of lading, on production thereof by him, according to the terms thereof; that *J. S.* upon the delivery to him of the said bills of lading, *bonâ fide*, and for valuable consideration, indorsed, assigned, and delivered the said bills of lading to the plaintiff, as a security for moneys advanced to *J. S.*; that the plaintiff then became and was, and still continued to be, the *bonâ fide* holder and indorsee and assign of the bills of lading, and of the said goods, and lawfully entitled to the possession of the bills of lading and of the said goods; that the freight, &c., were duly paid in *London;* that the ship sailed for *Bombay* with the goods on board, and it became the duty of the defendant, according to the terms of the bills of lading, and the custom, to deliver the goods to the *bonâ fide* holder and indorsee and assign of the said bills of lading, according to the terms of the said bills of lading and the custom of merchants in that behalf; yet, that, although the ship arrived at *Bombay*, having the goods on board, and although the plaintiff was the *bonâ fide* holder and indorsee, and lawfully entitled to the said bills of lading, and was the assign of the said bills of lading, and of the said goods, according to the terms of the said bills of lading, and according to the custom of merchants in that behalf, and lawfully entitled to the possession of the goods, on production of the said bills of lading, the defendant, wrongfully, and contrary to the terms of the said bills of lading, and contrary to his said duty, and to the custom of merchants in that behalf, delivered the goods to other persons, to the plaintiff unknown, not being the *bonâ fide* holders or indorsees or assigns of the said bills of lading, and not to the plaintiff, or any person on his behalf, — whereby the goods were lost to the plaintiff, &c.: —

Held, that the declaration was bad in substance, — bad, as a declaration in case, as founded upon a supposed breach of duty arising out of a contract

thirty casks of cochineal, then shipped on board thereof by one *George Rennie*, to be by the said defendant carried in his said vessel to *Bombay* aforesaid, for certain freight, moneys, and reward to be paid to the defendant in that behalf: That thereupon, and upon the shipment of the said goods and merchandise, one *Henry Poole*, as master and captain, and then being master and captain, of the said vessel for the said voyage, and the servant of the said defendant in that behalf, and by him then duly authorised in that behalf, signed and delivered to the said *George Rennie*, divers, to wit, two, bills of lading of and relating to the said goods and merchandise, and by which said bills of lading the defendant, to wit, by his said captain, acknowleged the shipment of the said goods and merchandise on board of the said vessel, and undertook to deliver the same at *Bombay* aforesaid, to

not by law transferable; and bad as a count in trover, as it did not allege a conversion, or state any facts which amounted to a conversion.

The defendant pleaded, that *J. S.* was the agent of *M.* & Co., merchants at *Bombay*, and in the habit of receiving consignments, and purchasing goods in *London* on their account; that the plaintiff was employed by *J. S.*, as a broker, to purchase and ship, and did purchase and ship, the goods in question for *M.* & Co., in *J. S.*'s name, under the bills of lading in the declaration mentioned; that the plaintiff sent an invoice to *J. S.*, and gave him notice of the shipment, in order that he might advise *M.* & Co. of the purchase and shipment, and transmit them a copy of the invoice, — which invoice *J. S.* did send out to *M.* & Co., with a letter of advice of the shipment; that, upon the shipment, the bills of lading were delivered by the master to the plaintiff as agent for *J. S.*; that the plaintiff did not deliver the bills of lading to *J. S.*, nor did he transmit the same, or suffer *J. S.* to transmit them, to *M.* & Co.; but that he, after the ship had proceeded on her voyage with the goods on board, fraudulently procured *J. S.* to indorse the bills of lading, for the purpose of securing a debt alleged to be due from *J. S.* to the plaintiff; that, upon the ship's arrival at *Bombay*, the master, during the space of four months, used all reasonable diligence to discover the holder, indorsee, or assign of the bills of lading, but was unable to do so, and there was during all that time no person ready at *Bombay* to produce the bills of lading, and receive the goods; and that, at the expiration of that time, the vessel being about to leave *Bombay*, and *M.* & Co. producing the invoice and letter of advice of the shipment so sent to them by *J. S.*, and demanding the goods, the master delivered the goods to *M.* & Co.: —

Held, that the plea was bad.

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the order of the said *George Rennie*, or to his assigns, for certain freight in that behalf, according to the terms of the said bills of lading,— and which said bills of lading were and are in the words and figures following, to wit, "Shipped, in good order and well conditioned, by *George Rennie*, in and upon the good ship called *Sophia Moffat*, whereof is master for this present voyage *Henry Poole*, and now riding at anchor in the port of *London*, and bound for *Bombay*, to say, twenty-seven casks merchandise, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of *Bombay* (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted), unto order or his assigns. Freight for the said goods to be paid in *London*, lost or not lost, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished, the other three to stand void. Dated, in *London*, the 14th of *September*, 1847. Contents unknown. *H. Poole.*" And the other of the said bills of lading was and is in the words and figures following, to wit, [setting out the second bill of lading, which was for "three casks of merchandise"]: That the said goods and merchandise in the said bills of lading mentioned were and are the goods and merchandise so shipped in the defendant's said vessel, to be carried to *Bombay* for reward and freight, as aforesaid: That, before and at the time of the shipment of the said goods and merchandise, and of the signing and delivering of the said bills of lading, and continually thenceforward to the time of the committing by the defendant of the grievances thereinafter mentioned,

there was, and still is, a good and approved custom and usage among merchants, traders, and ship-owners, to wit, at *London* and *Bombay*, that, when goods and merchandise are shipped for conveyance on board ship, for freight and reward in that behalf, and for and relating to which goods and merchandise, a bill of lading is signed and delivered to the shipper by the captain of such ship, such goods and merchandise are and shall be deliverable, at the place in that behalf therein mentioned, by the captain of such ship, to the *bonâ fide* holder, indorsee, and assign of the said bill of lading, on production thereof by him, according to the terms thereof, and that the duty of the owner of such ship, by whose captain and servant in that behalf such bill of lading hath been so signed and delivered, is, and shall be, to deliver the said goods and merchandise, at the said place, to the *bonâ fide* holder, indorsee, or assign of such bill of lading, on production thereof by him, according to the terms thereof: That the said *George Rennie*, upon the said delivery to him of the said bills of lading, to wit, on the day and year last aforesaid, *bonâ fide*, and for valuable consideration in that behalf, indorsed, assigned, and delivered the said bills of lading to the plaintiff, to wit, as a security to him, and in order that the plaintiff should be entitled to the possession of, and have a lien upon, the said bills of lading and the said goods and merchandise, for and until the payment to him of divers large sums of money, to wit, 2000*l.*, to wit, for moneys owing to him by the said *George Rennie*, that is to say, for moneys theretofore, to wit, on the 25th of *June*, 1847, by the said plaintiff advanced to and for and on behalf of the said *George Rennie*, at his request, to wit, for payment, on behalf of the said *George Rennie*, of the price of the said goods and merchandise, on the purchase thereof theretofore

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made by the said plaintiff for and at the request of the said *George Rennie*, and for the expenses of shipping the said goods; and the plaintiff then became, and thenceforward continually had been, and then was, the *bonâ fide* holder and indorsee and the assign of the said bills of lading, and of the said goods and merchandise, according to the terms of the said bills of lading, and according to the custom and usage of merchants in that behalf, and lawfully entitled to the possession of the said bills of lading, and of the said goods and merchandise: That the said freight in the said bills of lading mentioned, was duly paid in *London*, with primage and average accustomed, according to the terms of the said bills of lading, to wit, upon the day and year last aforesaid; and the said ship sailed and departed from *London* for *Bombay* aforesaid, having the said goods and merchandise on board thereof, to be carried and delivered as aforesaid, to wit, on the day and year last aforesaid: And that it became and was the duty of the defendant, according to the terms of the said bills of lading, and the custom of merchants in that behalf, to wit, the custom and usage aforesaid, to deliver the said goods and merchandise to the *bonâ fide* holder and indorsee and assign of the said bills of lading, according to the terms of the said bills of lading, and the custom of merchants in that behalf, to wit, the custom and usage aforesaid,—of all which the defendant had notice, to wit, on the day and year last aforesaid. Yet, that, although the said ship, afterwards, to wit, on the 1st of *February*, 1848, arrived at *Bombay* aforesaid, having the said goods and merchandise on board thereof; and although the plaintiff was then, and at the time of the committing of the grievances by the defendant thereinafter mentioned, the *bonâ fide* holder and indorsee of, and lawfully entitled to, the said bills of lading, and was then, and at the time of the committing of the said grievances, the assign of the said bills of lading, and of

the said goods and merchandise, according to the terms of the said bills of lading, and according to the custom of merchants in that behalf, to wit, the custom and usage aforesaid, and lawfully entitled to the possession of the said goods and merchandise, on production of the said bills of lading; yet the defendant wrongfully, and contrary to the terms of the said bills of lading, and contrary to his said duty, and to the custom of merchants in that behalf, to wit, the custom and usage aforesaid, delivered the said goods and merchandise to certain other persons, to wit, certain persons to the plaintiff unknown, not being the *bonâ fide* holders or indorsees or assigns of the said bills of lading, and not to the plaintiff, or any person on the plaintiff's behalf; and thereby the same, and every part thereof, had been and then were wholly lost to the plaintiff; and thereby also the plaintiff had lost and been deprived of his security and lien aforesaid, and had been and then was by the defendant wrongfully deprived of the possession of the said goods and merchandise, and had lost and been deprived of the moneys so advanced by him as aforesaid, for and at the request of the said shipper of the said goods as aforesaid, the whole and every part of which said moneys still remained due and unpaid and lost to the plaintiff.

Seventh plea.

The defendant pleaded, — seventhly, as to twenty-seven casks of cochineal, parcel of the said goods and merchandise in the first count mentioned, the same being the goods and merchandise in the bill of lading in the said first count first above mentioned, that theretofore, and before the committing of the said alleged grievances in that behalf mentioned, and before and during the time in that plea thereinafter mentioned, the said *George Rennie* was a merchant carrying on business in this kingdom, to wit, at *Liverpool*, and during all that time he the said *George Rennie* acted

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as agent for divers foreign merchants, and, among others, for certain foreign merchants then carrying on business in parts beyond the seas, to wit, at *Bombay*, in the *East Indies*, under the name and style of *Mhowjee D'harsey* & Co., but whose names are not otherwise or further known to the defendant; and the said *George Rennie* during that time had been used to receive in this kingdom, to wit, at *Liverpool* aforesaid, goods and merchandise consigned to him by the said *Mhowjee D'harsey* & Co., from *Bombay* aforesaid, to be sold and disposed of by him the said *George Rennie* for and on behalf of the said *Mowjee D'harsey* & Co., and also to buy other goods and merchandise in this kingdom for and on behalf, and according to the order, of the said *Mhowjee D'harsey* & Co., and to ship and send the same, when so bought, from this kingdom to the said *Mhowjee D'harsey* & Co., to parts beyond the seas, to wit, to *Bombay* aforesaid, — of all which the plaintiff, during all that time, had notice: That the plaintiff during that time had been and was engaged in business, to wit, as broker and merchant and commission agent, to wit, in *London*, and had been and was, as such broker and merchant, from time to time employed by the said *George Rennie* in and for the purpose of purchasing goods and merchandise for exportation, and of shipping the same, in the name of the said *George Rennie*, to be conveyed to divers foreign markets and ports: That, before the shipment in the said first count mentioned, to wit, on the 15th of *April*, 1847, a certain order was sent from the said *Mhowjee D'harsey* & Co., and was then, to wit, on the day and year aforesaid, received by the said *George Rennie*, to wit, for the purchase by him, on behalf of the said *Mhowjee D'harsey* & Co., of a certain large quantity of goods and merchandise, to wit, 2000 lbs. of black cochineal and 2000 lbs. of silver-coloured cochineal, and for the sending of the

same, when so purchased, to the said *Mhowjee D'harsey* & Co., to *Bombay* aforesaid, — of all which the plaintiff then had notice: That the plaintiff thereupon, to wit, on the day and year aforesaid, was employed by the said *George Rennie*, as the agent of the said *George Rennie*, to purchase the said goods and merchandise so ordered as aforesaid, and to ship the same on the behalf and in the name of the said *George Rennie*, to be conveyed to the said *Mhowjee D'harsey* & Co., to *Bombay* aforesaid, pursuant to the said order; and the plaintiff then, to wit, on the day and year aforesaid, in pursuance of the said employment, did purchase the said last-mentioned goods and merchandise, and did then cause the same to be shipped in and on board the said vessel in the said first count mentioned, under a certain bill of lading, to wit, the bill of lading in the said first count first mentioned; and the said last-mentioned goods and merchandise, and the said twenty-seven casks merchandise described in the said bill of lading in the said first count first mentioned, were and are the same identical goods and merchandise, and the said shipment of the said goods and merchandise so purchased by the plaintiff as aforesaid, pursuant to his said employment as the agent of and for the behalf of the said *George Rennie*, was and is the same shipment of the said goods and merchandise mentioned and described in the bill of lading in the said first count first above mentioned, in and on board the said vessel in the said first count mentioned, and under the said bill of lading in the said first count mentioned: That the plaintiff, upon the making of the said purchase and shipment, to wit, on the day and year aforesaid, sent a certain invoice, to wit, an invoice of the said goods and merchandise so purchased and shipped as aforesaid, to the said *George Rennie*, and then gave notice to him of the said shipment, for a certain purpose, that is to say, that he

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the said *George Rennie* might advise the said *Mhowjee D'harsey* & Co. of the said purchase and shipment, and transmit to them a copy of the said invoice, a copy of which said invoice he the said *George Rennie* did afterwards, to wit, on the day and year aforesaid, so send out, together with a letter of advice of such purchase and shipment, to the said *Mhowjee D'harsey* & Co., — of all which premises the plaintiff then had notice: That, upon the said shipment being made as aforesaid, the said bill of lading in the said first count first mentioned was delivered by the said *Henry Poole* to the plaintiff as the agent of the said *George Rennie;* and the said delivery to the plaintiff as such agent, was and is the delivery of the said last-mentioned bill of lading to the said *George Rennie* in the said first count mentioned; nevertheless, the plaintiff did not deliver the said last-mentioned bill of lading, or any part thereof, to the said *George Rennie*, nor did he transmit the same, or any part thereof, nor did he suffer or permit the said *George Rennie* to transmit the same, or any part thereof, to the said *Mhowjee D'harsey* & Co.; but, on the contrary thereof, after the said shipment, and after the said vessel had proceeded on her said voyage, with the said goods and merchandise so on board the same as aforesaid, to wit, on the 10th of *October*, 1847, the plaintiff fraudulently caused and procured the said *George Rennie* to indorse, and the said *George Rennie* fraudulently indorsed, the said bill of lading to him, the plaintiff, to wit, for the purpose of securing a certain debt then alleged to be due from the said *George Rennie* to the plaintiff, which said last-mentioned indorsement was and is the said indorsement, assignment, and delivery of the said bill of lading to the plaintiff in the said first count first mentioned: That, afterwards, to wit, on the 10th of *January*, 1848, the said vessel arrived at *Bombay* aforesaid, and the said

vessel there remained at *Bombay* from and after the said arrival thereof there as aforesaid, for a long space of time, to wit, for the space of four months then next following, the same being a sufficient and reasonable time for the holder, indorsee, or assignee of the said bill of lading to produce the same to the said *Henry Poole*, who during all that time was the master of the said vessel, and the agent of the defendant in that behalf, to wit, until the 10th of *May*, 1848; and, during all that time, the said *Henry Poole*, so being such master as aforesaid, was ready and willing to deliver the said last-mentioned goods and merchandise to the holder, indorsee, or assignee of the said last-mentioned bill of lading, on production thereof by him, and during all that time he the said *Henry Poole* used all reasonable care and diligence to discover the holder, indorsee, or assignee of the said last-mentioned bill of lading, but was wholly unable so to do, and, during all that time, no holder, indorsee, or assignee of the said last-mentioned bill of lading was ready, at *Bombay* aforesaid, to produce the last-mentioned bill of lading, and to receive the said last-mentioned goods and merchandise, or any part thereof: That afterwards, and at the expiration of such reasonable time as aforesaid, to wit, on the 10th of *May*, in the year last aforesaid, because it then became and was necessary for the said vessel to leave *Bombay* aforesaid, and to proceed with and prosecute the further voyage of the said vessel, and because the said *Mhowjee D'harsey* & Co. produced the last-mentioned copy of the said invoice of the said goods and merchandise in the said last-mentioned bill of lading mentioned, together with the said letter of advice of such shipment as aforesaid, so sent by the said *George Rennie* as aforesaid, and then demanded the said last-mentioned goods and merchandise from the said *Henry Poole*, so being such master as aforesaid, and then

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affirmed that they were the true owners of the said last-mentioned goods and merchandise, he, the said *Henry Poole*, on the faith of the said invoice and letter of advice, and being persuaded by the contents thereof, that the said last-mentioned goods and merchandise were the goods and merchandise of the said *Mhowjee D'harsey* & Co., and that they had been so shipped as aforesaid for and on behalf and for the benefit of the said *Mhowjee D'harsey* & Co. by the said *George Rennie*, as the agent of the said *Mhowjee D'harsey* & Co., he, the said *Henry Poole*, as he lawfully might, then, to wit, on the day and year aforesaid, delivered the said last-mentioned goods and merchandise to the said *Mhowjee D'harsey* & Co.; which was the delivery of the said last-mentioned goods and merchandise by the plaintiff in that behalf in the said first count complained of, — verification.

Eighth plea.

The eighth plea was similar to the seventh, and applied to the three casks of cochineal in the second bill of lading mentioned.

Demurrer.

To these pleas the plaintiff demurred specially, assigning for causes (as to each), that the said plea is double and multifarious, in this, to wit, that it sets up and offers several separate and distinct defences to the said action, that is to say, that the plaintiff was not the *bonâ fide* holder, indorsee, and assignee of the said bill of lading in that plea mentioned, and also states that the defendant was excused from delivering the said goods and merchandise in that plea mentioned to the holder, indorsee, and assignee of the said bill of lading, by reason of the laches and default of the holder thereof, in not producing the same to the master of the said vessel, and not being ready to receive the said goods and merchandise within a reasonable time for that purpose, and also that the said goods and merchandise in that plea mentioned were delivered to the consignee and

true owner thereof, who, as such, was entitled to the delivery thereof, and also that the holder and assignee of the said bill of lading in that plea mentioned, was the agent and consignee and true owner thereof, to whom the goods and merchandise in that plea mentioned were in fact delivered; — that the plea was an argumentative traverse and denial of the averment in the first count, that the plaintiff was the *bonâ fide* holder, indorsee, and assignee of the said bill of lading in that plea mentioned; — that the plea was an argumentative traverse of the usage and custom of merchants in the first count mentioned, to deliver the said goods and merchandise to the *bonâ fide* holder, indorsee, and assignee of the bill of lading; — that the plea was an argumentative traverse of the duty alleged in the first count, to deliver the same to the *bonâ fide* holder, indorsee, and assignee of the said bill of lading; — that the plea confessed the matters and causes of action in the first count mentioned, but did not sufficiently, or at all, avoid the legal effect and consequences thereof.

The defendant joined in demurrer.

Cowling, in support of the demurrers(*a*). The seventh and eighth pleas are bad in form and in substance.

(*a*) The points marked for argument on the part of the plaintiff, were — "that the pleas respectively were multifarious, as raising several distinct defences; that they respectively contained argumentative traverses of material averments in the first count of the declaration; and that they confessed the duty alleged, and the breach of it, as charged in the first count, and shewed no sufficient legal avoidance of or excuse for such breach: and, — if it were intended to be argued that the first count of the declaration was bad, — that the action lay by the assignee of the bill of lading, in respect of the duty attaching upon the ship-owner, as averred in that count; or, at all events, that it was sufficient, on general demurrer, as a special count in trover, inasmuch as it shewed the legal property in the goods to have been vested in the plaintiff, and a conversion by a tortious misdelivery."

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[*Maule*, J. We all think the pleas are bad. For the present, you may confine yourself to the declaration.] It is submitted that the indorsee of a bill of lading may maintain an action for a breach of the duty resulting from the contract on the part of the ship-owner; and that this declaration may be sustained, either as an informal count in trover, or as a count founded upon that duty. The facts, as they appear upon the record, are these:—The defendant, a ship-owner, receives goods from *Rennie*; his agent, the captain, signs a bill of lading, admitting the receipt of the goods from *Rennie*, and undertaking to deliver them, at *Bombay*, to *Rennie*'s order, on payment of freight. The declaration states that the freight was paid, and alleges a well-known usage, of which, as part of the law-merchant, the court will take notice. [*Maule*, J. Such a usage must be alleged as part of the contract; otherwise, it is a mere statement of evidence (*a*).] The plaintiff became an indorsee of the bill of lading for a valuable consideration; and of that fact the defendant had notice. The result is, that the defendant having received the goods, to be delivered to *Rennie*'s order, and *Rennie* having, by indorsing the bills of lading, conveyed the goods to the plaintiff, of which the defendant had notice, the latter is estopped from denying the plaintiff's right to the possession of them. [*Maule*, J. All this history of the goods and the bills of lading, is like the allegation of the finding in trover.] The declaration might possibly be bad on special demurrer, for stating all the facts; but it is clearly sufficient, on general demurrer and it goes on to allege a conversion. The defenda[illegible] having, by his agent, signed the bills of lading for [illegible] valuable consideration, and they having been, with [illegible] knowledge, indorsed over to the plaintiff, an impl[illegible]d duty arose, on the part of the defendant, to deliver [illegible]e

(*a*) And see *antè*, Vol. VIII. p. 967, note *A*.

goods to the plaintiff, as such indorsee; and case lies against him for a breach of such implied duty. [*Maule*, J. There seems to me to be a manifest want of privity. Have you any authority to fortify your position?] *Levy* v. *Langridge* (*a*) is an authority for it. There, the declaration, in case, stated that *L.*, the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, *for the use of himself and his sons;* that the defendant then, by falsely and fraudulently warranting the gun to have been made by *Nock*, and to be a good, safe, and secure gun, sold the said gun to *L.*, for the use of himself and his sons, for 24*l.*; whereas, in truth and in fact, the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the gun was not made by *Nock*, nor was a good, safe, and secure gun, but, on the contrary thereof, was made by a very inferior maker to *Nock*, and was a bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound, and of very inferior materials,— of all which the defendant, at the time of such warranty and sale, had notice; and that the plaintiff, *knowing and confiding in the said warranty*, used the gun, which but for the warranty he would not have done; and that the gun, being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded, whereby the plaintiff was greatly wounded, &c., and wholly by means of the premises, breach of duty, and improper conduct of the plaintiff, lost the use of his hand: and it was held, on error (after verdict for the plaintiff on not guilty, and on other pleas denying the warranty, and that the gun was unsafe, &c.), that the action was maintainable. Lord *Denman*, — in giving the judgment

(*a*) 4 *M.* & *W.* 337.

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of the court of error, there says: "We agree with the court of Exchequer, and affirm their judgment, on the ground stated by *Parke*, B., "that, as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud, is responsible to the party injured." Here, there was no fraud: but there was something that was equivalent, *viz.* the signing a bill of lading, contemplating the goods to be deliverable to the shipper's order. The two cases, therefore, in effect, contain the same ingredients; and the same objection applies to both, — there was no *contract* with the plaintiff. [*Maule*, J. They seem to put it on the ground of a public wrong. A *public* wrong, from which a private and particular injury results to an individual, gives that individual a right of action. But, where there is a *private* wrong, it is hard to say that one who sustains a private injury (but with whom no contract is made), can maintain an action. Any friend of the plaintiff in that case might bring an action,—any assignee, except one claiming through a thief, might equally maintain an action for a resulting injury, if the gun was sold for the use of the plaintiff and his assigns!] The action was founded upon the breach of duty. [*Maule*, J. No. The court held that the defendant below knew that the son (the plaintiff below) would use the gun, — and put it on the ground of a false representation being made, to the prejudice of the person who acted upon it. It was put upon the ground, not of breach of duty at all, but of tort. The plaintiff was one of the very persons for whose use the gun was understood to be sold.] In this case, the defendant knew that the bills of lading had been indorsed to the plaintiff for a valuable consideration. *Williams*, J. If there had been any fraud or misrepre-

sentation here, the case of *Levy* v. *Langridge* would have been in point. But this is purely matter of contract. *Cresswell*, J. In *Levy* v. *Langridge*, the defendant below did wrong in the first instance, in selling a bad gun. But, here, the defendant did no wrong in *signing* the bills of lading.] The defendant has, by his conduct, induced a third person to give value for the bills of lading. [*Maule*, J. The utmost that can be said, is, that he has induced the plaintiff to imagine that he had a right which the law did not give him. Can your view be sustained, without considering the indorsement of the bills of lading to transfer the property in the goods to the plaintiff? If that be so, it comes round to trover.] That might have been so, if this had been a case of negligence, and not of misfeasance. In *Boorman* v. *Brown* (*a*), the declaration (in case) stated, that the defendant was an oil-broker, and that the plaintiffs, linseed-crushers, retained him, as such broker, to sell and deliver for them thirty tons of linseed oil, according to the contracts of sale, to such persons as should purchase, for commission and reward to the defendant in that behalf, which retainer he accepted; that he, as such broker, in pursuance of the retainer, made a contract between the plaintiffs and *P.*, by which the plaintiffs sold to *P.*, and he bought of them, the thirty tons, at the price, &c., to be delivered by parcels at a place and times named in the declaration, each parcel to be paid for in ready money; that the plaintiffs consigned two of the parcels to the defendant, and he delivered them to *P.*, on payment; and that, after the making of the contract, and in pursuance thereof, and of the retainer, the plaintiffs consigned to the defendant, as such broker, the residue of the thirty tons, to be delivered by him to *P.*, on

(*a*) 3 *Q. B.* 511., 2 *Gale & D.* 793.

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payment; that the oil arrived, &c., of which the defendant had notice, and took upon himself the delivery according to the contract; *and thereupon it became and was the defendant's duty, as such broker as aforesaid, to use all reasonable care that the oil should not be delivered to P., or any other person, without the price being paid to the defendant, according to the contract;* yet that the defendant, not regarding such duty, did not use reasonable care, &c., that the oil should not be delivered, &c., without the price being paid, but neglected and refused so to do, and so negligently and carelessly behaved in the premises, that, by the defendant's mere carelessness and negligence, the last-mentioned oil was delivered to *H.* & Co., without the price being paid by *P.*, or any other person, to the defendant; by reason whereof, and of *P.* having become bankrupt and unable to pay, the plaintiffs lost the said oil, and the price thereof, &c. It was held by the court of Queen's Bench, after verdict for the plaintiffs, that the duty was laid in the declaration as resulting from the defendant's character of broker; but that the duties of a broker, as defined by statute and common law, did not include those said to have been violated by the defendant; and the judgment was arrested. But it was afterwards held by the court of Exchequer Chamber, on error, that the duty resulted from an express contract described in the declaration, and did not arise simply from the defendant's character of broker, and that, for the breach of such duty, an action of tort lay: and the judgment of the court below was reversed. [*Williams*, J. The judgment of the Exchequer Chamber in that case was affirmed by the House of Lords. (*a*)] This view of the case is not inconsistent with *Thompson* v. *Dominy* (*b*), where it was held that the effect of an indorsement

(*a*) See *Brown* v. *Boorman*, 11 *Clark & Fin.* 1.

(*b*) 14 *M. & W.* 403.

ıg is, to transfer the property in the
ɔ contract. Nor is *Berkley* v. *Wat-*
ıgainst the plaintiff.

(*b*). The declaration is clearly
ıurrer: it cannot be sustained as for
ıract, for, there is no contract; neither
an informal count in trover. [*Maule*, J.
ırself to the latter point.] The declaration
that the goods in question were shipped by
ıie: it is not alleged that he was the owner of
nem. It then sets out a usage or custom,— differing somewhat from the ordinary usage and custom of merchants, of which, according to *Brandão* v. *Barnett*(*c*),

(*a*) 7 *Ad.* & *E.* 29., 2 *N.* & *P.* 178., *W. W.* & *D.* 429. There, the declaration (in assumpsit) stated that the defendants *W.* and *N.* were owners of a ship; that, in consideration that the plaintiff, at their request, shipped goods on board, to be delivered to him, *W.* and *N.* promised to deliver: breach, non-delivery. *N.* pleaded separately, and traversed the shipment. On the trial, the plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to the plaintiff by *W.*, stating the goods to be shipped by *W.*, to be delivered to the plaintiff or assigns. Evidence also was given to shew that the plaintiff held the bill of lading for value. *W.* was the managing owner. It was held that *N.* might produce evidence that the goods were not shipped in fact, and was not estopped by the bill of lading, supposing such estoppel to exist in general, inasmuch as the plaintiff could support his issue only by making *W.* his agent, and, if *W.* was so, the plaintiff was cognisant, through him, of the fact.

(*b*) The points marked for argument on the part of the defendant, were,— "that the seventh and eighth pleas respectively were not open to the objections raised by the demurrers; that the declaration was bad, in this, that the custom therein set out was unreasonable, and contrary to law; that it was not alleged in, nor did it appear from, the declaration, that the plaintiff ever was ready at *Bombay* to receive the goods, or that he had any agent there, or that there was any person there to whom the goods could have been delivered on behalf of the plaintiff, or that the defendant, or the master of the vessel, ever had notice of the indorsement of the bill of lading to the plaintiff."

(*c*) *Antè*, Vol. III. p. 519. 12 *Clark* & *Fin.* 787.

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and other cases, the court will take judicial notice. [*Maule*, J. It is stating a piece of evidence merely (*a*).] The question how far contracts are affected by customs and local usages, was very much discussed, and many of the authorities adverted to, in *Hutton* v. *Warren* (*b*). It was there held that a custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to recover from the landlord or incoming tenant, a reasonable allowance for seeds and labour bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it, — is not excluded by a stipulation in the lease under which he holds, that he will consume three fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread, on the land, for the use of the landlord, on receiving a reasonable price for it. Here, the allegation of notice is, in effect, without date, — the day and year *last* aforesaid, refers to a time anterior to the shipping of the goods. The declaration then goes on to allege, that, although the ship afterwards arrived at *Bombay*, with the goods on board, and although the plaintiff was the *bonâ fide* holder and indorsee of, and entitled to, the bills of lading, and was the assignee of the said bills of lading, and of the said goods and merchandise, according to the terms of the bills of lading, and according to the custom of merchants in that behalf, and lawfully entitled to the possession of the goods, on production of the bills of lading, — yet that the defendant wrongfully delivered them to other persons, not being the *bonâ fide* holders, or indorsees, or assigns of the said bills of lading, and thereby they were lost to the plaintiff. All this is consistent with

(*a*) *Supra*, 310.

(*b*) 1 *M.* & *W.* 466., *Tyrwh.* & *G.* 646.

the plaintiff's having kept the bills of lading in *London*, and with there being no person at *Bombay* authorised or ready to receive the goods,—or with the goods being warehoused, the master having no notice who was the holder of the bills of lading, and with their having been destroyed by fire, in the hands of the warehousekeeper with whom they were so deposited.

Cowling, in reply. The allegations in the declaration are clearly not consistent with the last suggestion. [*Maule*, J. Assuming this to be a count in trover, would the statement as to the non-delivery of the goods be a good averment of a conversion?] It is submitted that it would. [*Cresswell*, J. It does not appear that the plaintiff ever put himself in a condition to demand the goods, by producing the bills of lading: nor does the declaration state facts to shew that the defendant has put it out of his power to deliver the goods, when the plaintiff is in a condition to demand them. *Williams*, J. Could we have adjudged the facts here stated, if found on a special verdict, to amount to a conversion? *Maule*, J. You neither aver the production of the bills of lading, nor allege any excuse for not producing them.] The declaration shews that the defendant has incapacitated himself from delivering the goods, and that they are wholly lost to the plaintiff. [*Cresswell*, J. That is an inference of law which does not arise from the facts stated.] It is an inference of fact; though, undoubtedly, it might have been alleged with greater accuracy. [*Maule*, J. The declaration does not shew that the goods were the goods of the plaintiff, or that they were *converted*.] Having received the goods as *Rennie*'s, the defendant is estopped from denying the title of *Rennie* or his assignee. The case is somewhat analogous to *Hawes* v. *Watson* (*a*): there *A.*, on the 26th of *Septem-*

(*a*) 2 *B.* & *C.* 540., 4 *D.* & *R.* 22., *R.* & *M.* 6.

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ber, sold to *B.*, by contract, one hundred casks of tallow, then lying at a wharf, at so much *per* cwt., and on the same day gave him a written order to the wharfingers, "to weigh, deliver, transfer, and re-house" the same; and, on the next day, *B.*, who had previously entered into a contract with *C.* & Co. for the sale of the three hundred casks of tallow, in part fulfilment of that contract, obtained from the wharfingers, and sent to *C* & Co., the following acknowledgment: — "Messrs. *C.* & Co. We have this day transferred to your account (by virtue of an order from *B.*) one hundred casks of tallow, &c., with charges from the 10th *October*:" and, upon receipt of this, *C.* & Co. paid *B.* the full amount of the tallow, and shortly afterwards the wharfingers delivered twenty-one of the casks to the order of *C.* & Co.: on the 11th *October*, *B.* stopped payment, and, on the 14th, *A.*, the original vendor, sent notice to the wharfingers not to deliver the remainder of the tallow to *B.* or his order, although the tallow had not been weighed. It was held, in trover by *C.* & Co. against the wharfingers, that, after their acknowledgment that they had transferred the tallow to *C.* & Co.'s account, they held it as the agents of *C.* & Co., and therefore were estopped, and could not set up as a defence a right in *A.* to stop it *in transitu*. *Smith* v. *Marsack* (*a*), recently decided in this court, is, in principle, the same. There, the second count stated that *C. W.* made her bill of exchange, payable to her order, and directed the same to the defendant; that the defendant accepted the bill; and that *C. W.* indorsed it to the plaintiff. The defendant pleaded that *C. W.*, before and at the time of the indorsement, was, and still continued, the wife of one *E. W.*, and that *E. W.* never authorised, or consented to, the indorsement of the

(*a*) *Antè*, Vol. VI. p. 486., 6 *D. & L.* 363.

bill by her. And it was held, that the plea was bad in substance, inasmuch as it is not competent to the acceptor of a bill made payable to the order of the drawer, to say that the latter has no power to indorse, when he himself has, by his acceptance of the bill so drawn, asserted that the drawer *has* such power; and that notwithstanding that the acceptor may, in such case, be compelled to pay the bill twice,—the husband's property in the bill not being changed by the indorsement of the wife, unauthorised by him.

MAULE, J. I am of opinion that the declaration in this case is bad, and consequently that the defendant is entitled to judgment. The declaration certainly is a very strange one: and the pleas appear to me to be still more strange. Assuming the declaration to be in case, it has been attempted to be supported, on the authority of a case of *Levy* v. *Langridge*, in the Exchequer. If, however, the declaration is in case, it proceeds upon a supposed liability arising out of a contract transferred by the indorsement of certain bills of lading. Now, it is perfectly clear that a contract cannot be transferred so as to enable the transferee to sue upon it. Generally speaking, the law has endeavoured to assimilate actions of tort arising out of contracts, with actions on contracts, giving the plaintiff the election to adopt either form of remedy; as in the case of actions against carriers, and the like. Now, here, the duty, the breach of which is complained of, entirely arises out of contract. I do not think, under these circumstances, that a right to sue can be transferred: therefore, the declaration, as a declaration in case for a breach of duty, is clearly bad.

Considering it, as I thought at first it might be considered, as an informal count in trover, I also think it substantially bad. It does not shew that the goods

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mentioned in the bills of lading, were the plaintiff's goods. It states that the goods were shipped by *Rennie*, and that the defendant, upon their shipment, signed bills of lading, undertaking to deliver them at *Bombay*, to *Rennie*, or his assigns. Assuming that the defendant is estopped from denying all that is admitted on the face of the record, it is not admitted that the goods were once the property of *Rennie*, or that they afterwards became the property of the plaintiff. If I were to hazard a conjecture on the subject, I should say that they were not *Rennie*'s goods; for, if they had been, the plaintiff would, no doubt, have so alleged. It is quite consistent with what is alleged, that the goods were not the goods of *Rennie*, and that the plaintiff has no property whatever in them. Another essential property of trover is also wanting here. It appears that the plaintiff claims to be the indorsee of two bills of lading, which were signed by the defendant, making the goods deliverable at *Bombay*; but it does not appear that the bills of lading were ever transmitted to *Bombay*, or presented to the defendant there. The duty of the defendant, as ship-owner, was, to keep the goods until some person presented the bills of lading to him at *Bombay*. But it is said, that, although, on the arrival of the ship, with the goods on board, at *Bombay*, the plaintiff was the *bonâ fide* holder and indorsee of the bills of lading, and was then, and at the time of the committing of the grievances, the assignee of the said bills of lading, and of the goods, according to the terms of the said bills of lading, and according to the custom of merchants in that behalf, and lawfully entitled to the possession of the said goods, on production of the said bills of lading, — yet the defendant wrongfully, and contrary to his duty, and to the custom of merchants in that behalf, delivered the goods to certain other persons, to the plaintiff unknown, not being the

bonâ fide holders or indorsees or assigns of the said bills of lading, and not to the plaintiff, or to any person on the plaintiff's behalf, and that the goods thereby were wholly lost to the plaintiff. It was, however, the defendant's duty to keep the goods *from* the plaintiff, until he, or some person on his behalf, produced the bills of lading. Then, the fact of the ship-owner not keeping the goods on board the ship for an indefinite time, clearly does not amount to a conversion. He has a right to deliver them to some one, until the bill of lading is produced. There is nothing in this declaration to shew that this defendant has done anything else: the declaration, therefore, is clearly bad as a count in trover; and there must be judgment for the defendant.

CRESSWELL, J. I am of the same opinion. It was insisted, in the first place, that this is an action of tort arising out of a contract. The breach of a contract may be a wrong in respect of which the party injured may sue in case, instead of suing upon the contract. This is properly a case of that sort. But it is difficult to imagine that such a cause of action can be conveyed to one to whom the contract is not transferable. Assuming, however, that that may be, does the declaration here shew any such breach of duty towards the plaintiff, as to entitle him to sue the defendant? The duty that is alleged, is, to deliver the goods upon the production of the bills of lading; but it is not alleged that the bills of lading were produced.

As to the other view of the case,—treating the count as an informal count in trover,—the plaintiff has carefully avoided alleging that *Rennie* had any property in the goods. The case stands thus:—Goods are shipped by *Rennie*, and the defendant contracts to deliver them at *Bombay* to *Rennie* or assigns. That contract is not

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In assumpsit by indorsees against the acceptor of a bill of exchange, the defendant pleaded, — that the plaintiffs had brought a former action against him upon the same bill (setting out the declaration in such former action), — that the defendant pleaded to the count on the bill, that, after the acceptance and indorsement thereof, and whilst the plaintiffs were the holders, and before it became due, it was agreed between the plaintiffs and the defendant, that, in the event of the bill being dishonoured, the plaintiffs should receive from the defendant a warrant of attorney for the amount of the bill, with interest and expenses, and that judgment should be entered up thereon, but that no execution should issue upon such judgment until the 25th of *December*, 1848, and that the time for payment of the bill should be extended until that day; that the bill became due on the 22nd of *September*, 1847, and that the defendant was ready and willing to give and execute, and then tendered and offered to the plaintiffs, his warrant of attorney, pursuant to the agreement, and requested them to accept the same, and to extend the time of payment of the bill until the 25th of *December*, 1848, but that the plaintiffs refused and neglected so to do, and, in violation of the agreement, sought to enforce payment of the bill; that the plaintiffs replied *de injuriâ* to such plea; and that the defendant obtained judgment in the said action. The plea then proceeded to aver the identity of the bill and the causes of action in both cases.

To this plea, the plaintiffs replied, that they *did* extend the time for payment of the bill until and after the said 25th of *December*, 1848, and that they had not, since the said recovery in the said plea mentioned, sought to enforce the payment of the bill, which still remained unpaid, and that the defendant had not given or executed to the plaintiffs a warrant of attorney: —

Held, on demurrer to the replication, that the plea, though containing unnecessary details of the pleadings in the former action, was a good answer to this action; and that the replication was bad.

THIS was an action of assumpsit, commenced by writ of summons, dated the 9th of *January*, 1849.

The first count of the declaration stated, that, theretofore, to wit, on the 19th of *June*, 1847, one *Robert Remmett* made his bill of exchange in writing, bearing date, to wit, the day and year aforesaid, and then directed the same to the defendant, and thereby required the defendant to pay to the order of the said *Robert Remmett* the sum of 575*l.* 1*s.*, for value received, three

months after the date thereof, which period had elapsed before the commencement of the suit; and the defendant then accepted the said bill of exchange; and the said *Robert Remmett* then indorsed the said bill of exchange to one *Owen Parry;* and the said *Owen Parry* then indorsed the said bill of exchange to the plaintiffs; and the defendant then, in consideration of the premises, promised the plaintiffs to pay them the amount of the said bill of exchange, according to the tenor and effect thereof, and of the said acceptance and indorsements thereof.

There was also a count upon an account stated.

Estoppel.

Plea, — to the first count, — that the plaintiffs ought not to be admitted or received to declare against the defendant, or to implead him, in respect of the several causes of action in the declaration mentioned, because the defendant said that the plaintiffs, theretofore, and before the commencement of the suit, and after the said bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of *October*, 1847, in the court of our lady the Queen, before Her Justices at *Westminster*, impleaded the defendant in an action on promises, and afterwards, to wit, on the 25th of *October*, in the year aforesaid, declared against the defendant in the said action, for that the said *Robert Remmett*, on the said 19th of *June*, 1847, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said *Robert Remmett*, three months after the date thereof, (which period the plaintiffs therein averred had elapsed before the commencement of the said action), the sum of 575*l.* 1*s.*, for value received, and that the defendant then accepted the said bill, and that the said *Robert Remmett* then indorsed the same to the said *Owen Parry*, who then indorsed the same to the

plaintiffs, and that the defendant then, in consideration of the said premises, promised the plaintiffs to pay them the amount of the said bill according to the tenor and effect thereof, and of the said acceptance and indorsement thereof; and also that the defendant, on the 1st of *October*, 1847, was indebted to the plaintiffs in 1000*l.* for money found to be due from the defendant to the plaintiffs on an account then stated between the plaintiffs and the defendant; and that the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the last-mentioned premises, promised the plaintiffs to pay them the said last-mentioned sum of money; yet that the defendant had disregarded his promises, and had not paid the amount of the said bill of exchange, or any part thereof, or any of the said several sums of money in the declaration mentioned, or any part thereof; to the damage of the plaintiffs of 1000*l.*: That, the plaintiffs having so declared in the said action as aforesaid, the defendant afterwards, in due course, and according to the practice of the said court, to wit, on the 8th of *November*, 1847, by *H. F. Holt*, his attorney, pleaded to the said action, in manner following, that is to say, to the last count of the said declaration in the said action, the defendant then pleaded that he did not promise in manner and form as therein alleged, &c., and to the said first count of the said declaration in the said action, the defendant then pleaded, that, after he accepted the said bill of exchange in that count mentioned, and after the indorsement thereof by the said *Robert Remmett* to the said *Owen Parry*, and after the indorsement thereof by the said *Owen Parry* to the plaintiffs, and whilst the said plaintiffs were the holders thereof, and before the same became due and payable, to wit, on the 19th of *June*, 1847, it was agreed by and between the plaintiffs and the defendant that, in consideration that the defendant would, in the

event of the said bill of exchange being dishonoured by the defendant when the same should become due and payable, then give and duly execute to the plaintiffs his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575*l.* 1*s.*, and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of *December*, 1848, with interest, at the rate of 5*l.* *per cent. per annum*, payable half-yearly, to be computed from the day when the said bill should become due and payable, and would also allow judgment to be then immediately entered on such warrant of attorney, and registered; that they the said plaintiffs would then accept such warrant of attorney from the defendant, and would not issue any execution thereon until the 25th of *December*, 1848, and would not enforce the said bill as against the said defendant, but would extend the time for payment of the same until the day and year last aforesaid; that the said bill became due and payable on the 22nd of *September* then last past, and was then dishonoured by the defendant; that, when the said bill became due and payable, to wit, on the day and year last aforesaid, he, the defendant, in pursuance of the agreement, was, and from thence until the time of pleading the said last-mentioned plea, had been, and still was, ready and willing to give and execute, and then tendered and offered to the plaintiffs, his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575*l.* 1*s.*, and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of *December*, 1848, and was also then, and from thence until the pleading of the said last-mentioned plea had been, and then still was, ready and willing, and then offered, to allow judgment to be then immediately entered on such warrant of attorney, and registered, — of all which premises, the plaintiffs, to wit, on the day and

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year last aforesaid, had due notice, and were then requested by the defendant to accept such warrant of attorney as aforesaid from the defendant, and to extend the time of payment of the said bill until the said 25th of *December*, 1848; yet that the plaintiffs did not nor would accept the said warrant of attorney from the defendant, but wholly refused and neglected so to do, and then unjustly, and in violation of the said agreement, sought to enforce payment of the said bill of exchange by the defendant; and the defendant then, in and by the said last-mentioned plea, offered and alleged that he was ready to verify the same: That he, the defendant, having so pleaded to the said action as aforesaid, the plaintiffs, afterwards, to wit, on the 8th of *November*, 1847, in due course, and according to the practice of the said court, replied to the said pleas of the defendant in the said action, in manner following, that is to say, by joining issue upon the said first plea of the defendant, and replying to the said last plea of the defendant, that the defendant, of his own wrong, and without the cause by the defendant in the said plea alleged, broke his said promise, and did not pay the amount of the said bill in the said first count of the said declaration in the said action mentioned, in manner and form as the plaintiffs had above in the said first count in that behalf complained; and the plaintiff in and by the said replication prayed that the same might be inquired of by the country &c.: That the defendent then, to wit, on the day and year last aforesaid, joined issue upon the said last-mentioned replication: That, issue having been so joined in the said action as aforesaid, such proceedings were thereupon had in the said suit, that afterwards, and before the commencement of this suit, to wit, on the 18th of *November*, 1847, at *Westminster-Hall*, in the county of *Middlesex*, before the Hon. Sir *C. Cresswell*, knight, one of the justices of our said lady the

Queen of the Bench at *Westminster* aforesaid, in the absence and in the place and stead of the Right Hon. Sir *Thomas Wilde*, knight, the chief justice of the said court of our said lady the Queen at *Westminster* aforesaid, the said issues joined between the said parties in the said action, in due course, and according to the practice of the said court, came on for trial; and at the said last-mentioned time and place came the plaintiffs in their own proper persons, and the defendant, by *H. F. Holt*, his attorney; and the jurors of the jury, being summoned in the said action, also came; who, to speak the truth of the matters in issue in the said action, being chosen, tried, and sworn, according to the form of the statute in such case made and provided, did, as to the first issue joined between the said parties as aforesaid, upon their oath say that he, the defendant, did not promise as in the last count of the said declaration in the said action alleged; and, as to the last issue joined between the said parties as aforesaid, the jurors aforesaid did, upon their oath aforesaid, say that the defendant did not, of his own wrong, or without the cause by the defendant in the said last plea of the defendant alleged, break his said promise, and that the defendant, for the causes by him in his said last plea in that behalf alleged, did not pay the amount of the bill in the said first count of the said declaration in the said action mentioned, in manner and form as in that plea was alleged: That thereupon, afterwards, and after the said trial of the said action, and before the commencement of this suit, to wit, on the 2nd of *December*, 1847, by the consideration and judgment of the said court, it was considered that the plaintiffs should take nothing by their said writ in the said action, but that they should be in mercy &c., and that the defendant should go without day &c.; and, by the like consideration and judgment, it was further considered by the court

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there that the defendant should recover against the plaintiffs 31*l.* 1*s.* 1*d.* for his costs and charges by him about his defence in that behalf laid out and expended, by the court there adjudged to the defendant, and with his assent, according to the form of the statute in such case made and provided; and that the defendant should have execution thereof &c., — *prout patet*, &c.: That the said bill of exchange in the said first count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said bill of exchange in the first count of the declaration in this action mentioned, were one and the same, and not other or different bills of exchange; and that the said supposed account stated in the last count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said account stated in the said last count of the said declaration in this action mentioned, were one and the same account, and not other or different accounts stated; and that the said supposed promises and causes of action in the said declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said promises and causes of action in the declaration in this action mentioned, were the same promises and causes of action, and not other or different promises or causes of action; and this the defendant was ready to verify by the said record; wherefore, the defendant prayed judgment whether the plaintiffs ought to be permitted to implead the defendant for the alleged breach of promises in the said first count of the declaration in this action mentioned, or to say that he, the defendant, promised as in the last count of the said declaration in this action mentioned, &c.

To this plea, the plaintiffs replied, that they, the plaintiffs, ought not to be barred from declaring against the defendant, or from impleading him in respect of the

causes of action in the said first count of the said declaration in this action mentioned, because they said that they, the plaintiffs, *did* extend the time, and give the defendant time for payment of the bill of exchange in the said first count of the declaration in this action mentioned, until and after the said 25th of *December*, 1848, and the plaintiffs had not, since the said recovery in the said plea mentioned, until the commencement of this suit, sought to enforce the payment of the bill of exchange in the said first count of the declaration in this action mentioned, and the amount of the bill of exchange was still unpaid to the plaintiffs; that the said 25th of *December*, 1848, had elapsed and passed long before the commencement of this suit; and that the defendant had not, at any time hitherto, given or executed to the plaintiffs any warrant of attorney for the amount of the said bill, or any part thereof, or otherwise howsoever; and that this the plaintiffs were ready to verify, wherefore the plaintiffs prayed judgment if they ought to be barred from impleading the defendant for the said breach of promise in the said first count of the declaration in this action mentioned.

As to the second count, there was a *nolle prosequi.*

Demurrer.

Special demurrer to the replication to the first count, assigning for causes, — that, although the said replication confesses that the judgment in the said plea mentioned, was given by the said court therein also mentioned, and that the same remains in full force and effect, and not in the least reversed or made void, yet the said replication does not state or shew any cause or reason why the said judgment should not, and does not, estop the plaintiffs to declare against the defendant, or to implead him in respect of the several causes of action in the said first count of the declaration in this action mentioned; — that an existing and unreversed judgment in the defendant's favour, upon a plea in bar given by a

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court of competent jurisdiction, in an action of contract, precludes and estops the plaintiffs from again vexing or suing the defendant by a further action or suit, upon or in respect of the same identical cause of action as that to which such plea was pleaded; — that, the said judgment on the said plea of the defendant, being and remaining in full force and effect, and not in the least reversed or made void, the plea upon which the same was given, must be taken to be a good and valid one in law; and that it can be so only upon the ground that the agreement therein stated and set forth operated as a suspension of the plaintiff's right of action upon or in respect of the said bill in the first count of the said declaration mentioned, and which said right of action having been suspended by the act and agreement of the plaintiffs, is altogether gone and destroyed in law: — that it appears from the said plea pleaded in the said previous action, and the said judgment given thereon as aforesaid, that the right of action upon or on account of the said bill in the said first count of the declaration mentioned, hath been released and extinguished; — that the said replication is repugnant, contradictory, and absurd, in this, to wit, that, although the said replication confesses the several allegations in the said plea of the defendant, and that such action as therein mentioned was brought by the plaintiffs against the defendant before the said 25th of *December*, 1848, yet the said replication alleges that the plaintiffs did extend the time, and did give the defendant time, for the payment of the said bill in the said first count of the declaration in this action mentioned, until and after the said 25th of *December*, 1848; — that the said last-mentioned allegation operates as an argumentative denial of such action as in the said plea of the defendant mentioned, having been brought, as in the said plea alleged; — that it is not stated nor alleged, nor doth it appear, in or by the

said replication, that the plaintiffs ever called upon or required the defendant to give or execute to the plaintiffs the said warrant of attorney for the amount of the said bill, or that the defendant ever refused to give or execute the said warrant of attorney: — that, even had the defendant refused, such refusal would not have conferred upon the plaintiffs the right to declare against the defendant, or implead him, in respect of the causes of action in the said first count of the declaration in this action mentioned, whilst the said judgment remained in force and not reversed.

Joinder in demurrer.

C. Wood (with whom was *Manning*, Serjt.), in support of the demurrer. The plea, though perhaps it contains statements that are unnecessary (see 1 *Wms. Saund.* 5th edit. p. 91 *a*, n. (2).), is nevertheless a good plea of judgment recovered; and the replication affords no sufficient answer to it. The plea is a good estoppel, and is conclusive; and it is not competent to the plaintiff to shew that the judgment is bad: *Trevivan* v. *Lawrence* (*a*); *Vooght* v. *Winch* (*b*); *Doe* v. *Huddart* (*c*); *Doe* v. *Wright* (*d*); 2 *Smith*'s Leading Cases, 445. If the judgment be improper, it can only be reversed on writ of error: *Holmes* v. *Walsh*. (*e*) It may be said that the agreement stated in the plea in the former action, only amounted to an agreement to suspend the right of action: but the recent case of *Ford* v. *Beech* (*g*) shews that such an agreement operates as a total ex-

(*a*) 1 *Salk.* 276., 6 *Mod.* 256., 2 Lord *Raym.* 1036.

(*b*) 2 *B & Ald.* 662. And see 3 *N. & M.* 273.; 5 *N. & M.* 212.; 3 *M. & G.* 737.; 4 *M. & G.* 216., n.; *antè*, Vol. VII. pp. 331. 338.

(*c*) 2 *C. M. & R.* 316., 4 *Dowl. P. C.* 437.

(*d*) 10 *Ad. & E.* 763, 2 *P. & D.* 672

(*e*) 7 *T. R.* 458.

(*g*) 11 *Q. B.* 852., 5 *D. & L.* 610. And see *Gibbons* v. *Vouillon*, *antè*, Vol. VIII. p. 483.

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tinguishment of the right, and is therefore pleadable in bar.

The replication admits that the judgment in the former action is good, and stands unreversed, and that the action was brought in respect of the same causes of action as those for which this action is brought. The only answer that is sought to be given to the plea, is, that the plaintiffs did extend and give time for the defendant to pay the bill until after the day named, and that that day had elapsed before the commencement of this suit. That is repugnant to the admission involved in the replication. The replication goes on to allege that the defendant did not give or execute to the plaintiffs a warrant of attorney for the amount of the bill but it does not state that the defendant was ever called upon to do so, and that he refused. The allegation, therefore, is a negative pregnant with the affirmative that the plaintiffs demanded and the defendant refused to give such warrant of attorney. In *Ripley* v. *M'Clure* (*a*), a declaration stated an executory contract whereby the plaintiff agreed to sell, and the defendant to buy, on arrival by a certain ship, one third of a cargo of tea, to be consigned to the plaintiff, and delivered in *Belfast* from the ship to the defendant, at a certain price, payable after delivery. The declaration then averred that the ship arrived at *Belfast* with a cargo of tea consigned to the plaintiff; that the plaintiff was ready and willing to deliver the cargo in *Belfast* to the defendant, according to the agreement; yet the defendant, before the arrival of the ship with the cargo at *Belfast*, discharged the plaintiff from delivering the cargo, and thenceforth refused to perform the agreement. The third plea, as to so much of the breach as

(*a*) 4 *Exch.* 345; affirmed on error, *M'Clure* v. *Ripley*, 5 *Exch.* 140.

related to discharging the plaintiff from delivering the cargo, traversed the discharge: the fourth plea, which was pleaded as to so much of the breach as related to the defendant's having, before the arrival of the ship with her cargo at *Belfast*, discharged the plaintiff from delivering the cargo, stated, that, before the cargo arrived at *Belfast*, the defendant retracted his discharge: the fifth plea, as to the residue of the breach, denied that the plaintiff was ready and willing to deliver the cargo. It was held,—first, that the defendant was not bound, before the arrival of the cargo, to give the plaintiff a distinct answer whether he would fulfil the contract or not;—and, secondly, that a refusal by the defendant, *before* the arrival of the cargo, to perform the contract, was not a breach of it; but that such refusal unretracted down to, and inclusive of, the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal, and a waiver of the condition precedent of delivery; and, consequently, that the defendant was liable for the breach of contract. So, here, the replication must be taken to admit that the defendant has been continually offering to execute the warrant of attorney.

Peacock (with whom was *Hugh Hill*), *contrà*. The plea is clearly bad. This action was commenced on the 9th of *July*, 1849; and the answer attempted to be set up, is, that the plaintiffs ought not to be permitted or received to declare against the defendant, or to implead him in respect of the several causes of action in the declaration mentioned, because, before the commencement of this suit, and after the bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of *October*, 1847, the plaintiffs impleaded the defendant in the court of

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Queen's Bench in respect of the same bill and causes of action; and because the defendant obtained judgment in that action upon a plea alleging an agreement to suspend the plaintiffs' right to sue in respect of the bill until the 25th of *December*, 1848. [*Maule*, J. The plea avers that the causes of action in both actions are identical. Then it appears that an action was brought, and that the defendant pleaded to the action, and obtained a judgment that he go thereof without day. Does not that shew a sufficient bar to the present action?] It is submitted that it does not. [*Maule*, J. The proper answer to the plea would have been, that the present action was not brought for the same cause as the former. The effect of an agreement to suspend the remedy operating as a total bar, was very much considered in *Ford* v. *Beech*, in error,—where the case of *Stracy* v. *The Bank of England* (*a*) was explained and materially qualified. (*b*)] It sufficiently appears on the face of the pleadings here, that this is not for the same cause of action as the former. An estoppel operates to prevent a party from alleging a fact contrary to what he has before alleged or admitted. [*Cresswell*, J. Are you suing in this action for the same cause as in the first action?] No. [*Cresswell*, J. Then, why not traverse the allegation of identity?] It could not be necessary, when the record as it stands clearly shews that the two causes of action are different. Would it be for the jury to say whether or not the two declarations were the same? [*Maule*, J. I think it would.] Suppose a first action brought by the plaintiff as executor, and it turned out that he now claimed under letters of administration? [*Cresswell*, J. In that case, he would be a different person: the cause of action would be totally different.] *Robinson*'s case (*c*) is an authority to shew

(*a*) 6 *Bingh.* 754., 4 *M.* & *P.* 639.

(*b*) 11 *Q. B.* 874.

(*c*) 5 *Co. Rep.* 32. b.

months after the date thereof, which period had elapsed before the commencement of the suit; and the defendant then accepted the said bill of exchange; and the said *Robert Remmett* then indorsed the said bill of exchange to one *Owen Parry*; and the said *Owen Parry* then indorsed the said bill of exchange to the plaintiffs; and the defendant then, in consideration of the premises, promised the plaintiffs to pay them the amount of the said bill of exchange, according to the tenor and effect thereof, and of the said acceptance and indorsements thereof.

There was also a count upon an account stated.

Estoppel.

Plea, — to the first count, — that the plaintiffs ought not to be admitted or received to declare against the defendant, or to implead him, in respect of the several causes of action in the declaration mentioned, because the defendant said that the plaintiffs, theretofore, and before the commencement of the suit, and after the said bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of *October*, 1847, in the court of our lady the Queen, before Her justices at *Westminster*, impleaded the defendant in an action on promises, and afterwards, to wit, on the 25th of *October*, in the year aforesaid, declared against the defendant in the said action, for that the said *Robert Remmett*, on the said 19th of *June*, 1847, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said *Robert Remmett*, three months after the date thereof, (which period the plaintiffs therein averred had elapsed before the commencement of the said action), the sum of 575*l.* 1*s.*, for value received, and that the defendant then accepted the said bill, and that the said *Robert Remmett* then indorsed the same to the said *Owen Parry*, who then indorsed the same to the

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replication does not deny it. In *Robinson's* case, it appeared upon the face of the pleadings that the two causes of action *could not* be identical.

TALFOURD, J. I am of the same opinion. The causes of action must have been the same or different. If the same, the judgment in the former action is a bar: if different, the allegation of identity might properly be traversed by the replication. The plaintiff not having adopted that very obvious course, there must be judgment for the defendant.

Judgment for the defendant.

Ex parte KEIGHLEY, *in re* KEIGHLEY *v.* GOODMAN.

Feb. 25.

The 91st section of the county-court act, 9 & 10 *Vict. c.* 95., does not preclude an attorney from recovering from his client a reasonable remuneration for his work and labour done *out of court*, before the institution of a suit, or take away the right of the superior courts to allow on taxation a reasonable remuneration for this description of labour.

ON the 28th of *November*, 1848, *Keighley* delivered to *Goodman* two bills of costs,—the one, of 73*l.* 9*s.* 2*d.*, for general business; the other, of 20*l.* 19*s.* 2*d.*, for business done in relation to a suit in the *Edmonton* county-court, wherein *Goodman* sought to recover damages against one *Martin* for an excessive distress upon goods in the possession of *Goodman* under a mortgage-deed. In the suit in the county-court, *Goodman* claimed, and recovered, 19*l.* 19*s.*, being 12*l.* 10*s.*, the sum levied beyond the amount due for rent, and 7*l.* 9*s.* for damages, — that sum having been charged by *Keighley* for investigating the matter on his behalf, — together with 6*l.* 2*s.* 4*d.* for costs.

On the 5th of *April*, 1849, *Keighley* brought an action against *Goodman*, in this court, to recover the sum of 56*l.*

event of the said bill of exchange being dishonoured by the defendant when the same should become due and payable, then give and duly execute to the plaintiffs his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575*l.* 1*s.*, and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of *December*, 1848, with interest, at the rate of 5*l.* *per cent. per annum*, payable half-yearly, to be computed from the day when the said bill should become due and payable, and would also allow judgment to be then immediately entered on such warrant of attorney, and registered; that they the said plaintiffs would then accept such warrant of attorney from the defendant, and would not issue any execution thereon until the 25th of *December*, 1848, and would not enforce the said bill as against the said defendant, but would extend the time for payment of the same until the day and year last aforesaid; that the said bill became due and payable on the 22nd of *September* then last past, and was then dishonoured by the defendant; that, when the said bill became due and payable, to wit, on the day and year last aforesaid, he, the defendant, in pursuance of the agreement, was, and from thence until the time of pleading the said last-mentioned plea, had been, and still was, ready and willing to give and execute, and then tendered and offered to the plaintiffs, his warrant of attorney for the amount of the said bill, that is to say, for the sum of 575*l.* 1*s.*, and also for all charges and expenses relating to the said warrant of attorney, to be paid on the 25th of *December*, 1848, and was also then, and from thence until the pleading of the said last-mentioned plea had been, and then still was, ready and willing, and then offered, to allow judgment to be then immediately entered on such warrant of attorney, and registered, — of all which premises, the plaintiffs, to wit, on the day and

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year last aforesaid, had due notice, and were then requested by the defendant to accept such warrant of attorney as aforesaid from the defendant, and to extend the time of payment of the said bill until the said 25th of *December*, 1848; yet that the plaintiffs did not nor would accept the said warrant of attorney from the defendant, but wholly refused and neglected so to do, and then unjustly, and in violation of the said agreement, sought to enforce payment of the said bill of exchange by the defendant; and the defendant then, in and by the said last-mentioned plea, offered and alleged that he was ready to verify the same: That he, the defendant, having so pleaded to the said action as aforesaid, the plaintiffs, afterwards, to wit, on the 8th of *November*, 1847, in due course, and according to the practice of the said court, replied to the said pleas of the defendant in the said action, in manner following, that is to say, by joining issue upon the said first plea of the defendant, and replying to the said last plea of the defendant, that the defendant, of his own wrong, and without the cause by the defendant in the said plea alleged, broke his said promise, and did not pay the amount of the said bill in the said first count of the said declaration in the said action mentioned, in manner and form as the plaintiffs had above in the said first count in that behalf complained; and the plaintiff in and by the said replication prayed that the same might be inquired of by the country &c.: That the defendent then, to wit, on the day and year last aforesaid, joined issue upon the said last-mentioned replication: That, issue having been so joined in the said action as aforesaid, such proceedings were thereupon had in the said suit, that afterward and before the commencement of this suit, to wit, the 18th of *November*, 1847, at *Westminster-Hall*, the county of *Middlesex*, before the Hon. Sir *C. Cr*[illegible] *well*, knight, one of the justices of our said lady

appearance in court. The court of Queen's Bench, in a case of *Ex parte Clipperton, in re Green* (*a*), decided that this section of the act applies to costs between attorney and client, and includes every thing that is done by the attorney in regard to a suit in that court, whether before, or at, or after the hearing. That clearly is not a correct view of the statute. [*Maule*, J. I should certainly say that appearing and acting in court, must be something different from business done in the attorney's office. *Wilde*, C. J. These regulations would seem to be applicable only as between party and party. *Maule*, J. It is not incident to a court to tax costs as between attorney and client.]

A rule nisi having been granted,

Byles, Serjt., in the course of the same term, shewed cause. The words of the 91st section are clear and precise, that the attorney shall in no case be allowed, on taxation, more than 15*s.*, for appearing or acting on behalf of any other person in the county-court. [*Maule*, J. Is he to have 15*s.* only, or 15*s.* *plus* the expenses out of pocket?] Fifteen shillings *plus* the expenses out of pocket. The court of Queen's Bench has, in the case referred to, put a construction upon the statute, which must govern this case, *viz.* that the prescribed fee includes every thing that is done by the attorney in relation to the suit, whether before, or at, or after the hearing. *Patteson*, J., in delivering the judgment of the court, there says: "The words of the section are very clear, — 'that no attorney shall be entitled to have or recover therefore' (that is, for appearing or acting on behalf of any other person in the county-court,) more than the sums there specified, which have been allowed by the master. We are of

(*a*) 12 *Jurist*, 1044.

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there that the defendant should recover against the plaintiffs 31*l.* 1*s.* 1*d.* for his costs and charges by him about his defence in that behalf laid out and expended, by the court there adjudged to the defendant, and with his assent, according to the form of the statute in such case made and provided; and that the defendant should have execution thereof &c., — *prout patet*, &c.: That the said bill of exchange in the said first count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said bill of exchange in the first count of the declaration in this action mentioned, were one and the same, and not other or different bills of exchange; and that the said supposed account stated in the last count of the declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said account stated in the said last count of the said declaration in this action mentioned, were one and the same account, and not other or different accounts stated; and that the said supposed promises and causes of action in the said declaration in the said action in which judgment was so given as aforesaid, mentioned, and the said promises and causes of action in the declaration in this action mentioned, were the same promises and causes of action, and not other or different promises or causes of action; and this the defendant was ready to verify by the said record; wherefore, the defendant prayed judgment whether the plaintiffs ought to be permitted to implead the defendant for the alleged breach of promises in the said first count of the declaration in this action mentioned, or to say that he, the defendant, promised as in the last count of the said declaration in this action mentioned, &c.

To this plea, the plaintiffs replied, that they, the plaintiffs, ought not to be barred from declaring against the defendant, or from impleading him in respect of the

causes of action in the said first count of the said declaration in this action mentioned, because they said that they, the plaintiffs, *did* extend the time, and give the defendant time for payment of the bill of exchange in the said first count of the declaration in this action mentioned, until and after the said 25th of *December*, 1848, and the plaintiffs had not, since the said recovery in the said plea mentioned, until the commencement of this suit, sought to enforce the payment of the bill of exchange in the said first count of the declaration in this action mentioned, and the amount of the bill of exchange was still unpaid to the plaintiffs; that the said 25th of *December*, 1848, had elapsed and passed long before the commencement of this suit; and that the defendant had not, at any time hitherto, given or executed to the plaintiffs any warrant of attorney for the amount of the said bill, or any part thereof, or otherwise howsoever; and that this the plaintiffs were ready to verify, wherefore the plaintiffs prayed judgment if they ought to be barred from impleading the defendant for the said breach of promise in the said first count of the declaration in this action mentioned.

As to the second count, there was a *nolle prosequi*.

Demurrer.

Special demurrer to the replication to the first count, assigning for causes, — that, although the said replication confesses that the judgment in the said plea mentioned, was given by the said court therein also mentioned, and that the same remains in full force and effect, and not in the least reversed or made void, yet the said replication does not state or shew any cause or reason why the said judgment should not, and does not, estop the plaintiffs to declare against the defendant, or to implead him in respect of the several causes of action in the said first count of the declaration in this action mentioned; — that an existing and unreversed judgment in the defendant's favour, upon a plea in bar given by a

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court of competent jurisdiction, in an action of contract, precludes and estops the plaintiffs from again vexing or suing the defendant by a further action or suit, upon or in respect of the same identical cause of action as that to which such plea was pleaded; — that, the said judgment on the said plea of the defendant, being and remaining in full force and effect, and not in the least reversed or made void, the plea upon which the same was given, must be taken to be a good and valid one in law; and that it can be so only upon the ground that the agreement therein stated and set forth operated as a suspension of the plaintiff's right of action upon or in respect of the said bill in the first count of the said declaration mentioned, and which said right of action having been suspended by the act and agreement of the plaintiffs, is altogether gone and destroyed in law: — that it appears from the said plea pleaded in the said previous action, and the said judgment given thereon as aforesaid, that the right of action upon or on account of the said bill in the said first count of the declaration mentioned, hath been released and extinguished; — that the said replication is repugnant, contradictory, and absurd, in this, to wit, that, although the said replication confesses the several allegations in the said plea of the defendant, and that such action as therein mentioned was brought by the plaintiffs against the defendant before the said 25th of *December*, 1848, yet the said replication alleges that the plaintiffs did extend the time, and did give the defendant time, for the payment of the said bill in the said first count of the declaration in this action mentioned, until and after the said 25th of *December*, 1848; — that the said last-mentioned allegation operates as an argumentative denial of such action as in the said plea of the defendant mentioned, having been brought, as in the said plea alleged; — that it is not stated nor alleged, nor doth it appear, in or by the

said replication, that the plaintiffs ever called upon or required the defendant to give or execute to the plaintiffs the said warrant of attorney for the amount of the said bill, or that the defendant ever refused to give or execute the said warrant of attorney: — that, even had the defendant refused, such refusal would not have conferred upon the plaintiffs the right to declare against the defendant, or implead him, in respect of the causes of action in the said first count of the declaration in this action mentioned, whilst the said judgment remained in force and not reversed.

Joinder in demurrer.

C. Wood (with whom was *Manning*, Serjt.), in support of the demurrer. The plea, though perhaps it contains statements that are unnecessary (see 1 *Wms. Saund.* 5th edit. p. 91 *a*, n. (2).), is nevertheless a good plea of judgment recovered; and the replication affords no sufficient answer to it. The plea is a good estoppel, and is conclusive; and it is not competent to the plaintiff to shew that the judgment is bad: *Trevivan* v. *Lawrence* (*a*); *Vooght* v. *Winch* (*b*); *Doe* v. *Huddart* (*c*); *Doe* v. *Wright* (*d*); 2 *Smith's* Leading Cases, 445. If the judgment be improper, it can only be reversed on writ of error: *Holmes* v. *Walsh.* (*e*) It may be said that the agreement stated in the plea in the former action, only amounted to an agreement to suspend the right of action: but the recent case of *Ford* v. *Beech* (*g*) shews that such an agreement operates as a total ex-

(a) 1 *Salk.* 276., 6 *Mod.* 256., 2 Lord *Raym.* 1036.

(b) 2 *B & Ald.* 662. And see 3 *N. & M.* 273.; 5 *N. & M.* 212.; 3 *M. & G.* 737.; 4 *M. & G.* 216., n.; *antè*, Vol. VII. pp. 331. 333.

(c) 2 *C. M. & R.* 316., 4 *Dowl. P. C.* 437.

(d) 10 *Ad. & E.* 763, 2 *P. & D.* 672

(e) 7 *T. R.* 458.

(g) 11 *Q. B.* 852., 5 *D. & L.* 610. And see *Gibbons* v. *Vouillon*, *antè*, Vol. VIII. p. 483.

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tinguishment of the right, and is therefore pleadable in bar.

The replication admits that the judgment in the former action is good, and stands unreversed, and that the action was brought in respect of the same causes of action as those for which this action is brought. The only answer that is sought to be given to the plea, is, that the plaintiffs did extend and give time for the defendant to pay the bill until after the day named, and that that day had elapsed before the commencement of this suit. That is repugnant to the admission involved in the replication. The replication goes on to allege that the defendant did not give or execute to the plaintiffs a warrant of attorney for the amount of the bill: but it does not state that the defendant was ever called upon to do so, and that he refused. The allegation, therefore, is a negative pregnant with the affirmative that the plaintiffs demanded and the defendant refused to give such warrant of attorney. In *Ripley* v. *M'Clure* (*a*), a declaration stated an executory contract whereby the plaintiff agreed to sell, and the defendant to buy, on arrival by a certain ship, one third of a cargo of tea, to be consigned to the plaintiff, and delivered in *Belfast* from the ship to the defendant, at a certain price, payable after delivery. The declaration then averred that the ship arrived at *Belfast* with a cargo of tea consigned to the plaintiff; that the plaintiff was ready and willing to deliver the cargo in *Belfast* to the defendant, according to the agreement; yet the defendant, before the arrival of the ship with the cargo at *Belfast*, discharged the plaintiff from delivering the cargo, and thenceforth refused to perform the agreement. The third plea, as to so much of the breach as

(*a*) 4 *Exch.* 345; affirmed on error, *M'Clure* v. *Ripley*, 5 *Exch.* 140.

related to discharging the plaintiff from delivering the cargo, traversed the discharge: the fourth plea, which was pleaded as to so much of the breach as related to the defendant's having, before the arrival of the ship with her cargo at *Belfast*, discharged the plaintiff from delivering the cargo, stated, that, before the cargo arrived at *Belfast*, the defendant retracted his discharge: the fifth plea, as to the residue of the breach, denied that the plaintiff was ready and willing to deliver the cargo. It was held,—first, that the defendant was not bound, before the arrival of the cargo, to give the plaintiff a distinct answer whether he would fulfil the contract or not;—and, secondly, that a refusal by the defendant, *before* the arrival of the cargo, to perform the contract, was not a breach of it; but that such refusal unretracted down to, and inclusive of, the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal, and a waiver of the condition precedent of delivery; and, consequently, that the defendant was liable for the breach of contract. So, here, the replication must be taken to admit that the defendant has been continually offering to execute the warrant of attorney.

Peacock (with whom was *Hugh Hill*), *contrà*. The plea is clearly bad. This action was commenced on the 9th of *July*, 1849; and the answer attempted to be set up, is, that the plaintiffs ought not to be permitted or received to declare against the defendant, or to implead him in respect of the several causes of action in the declaration mentioned, because, before the commencement of this suit, and after the bill of exchange in the first count mentioned became due and payable, and after the making of the promises in the declaration mentioned, to wit, on the 2nd of *October*, 1847, the plaintiffs impleaded the defendant in the court of

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Queen's Bench in respect of the same bill and causes o action; and because the defendant obtained judgmen in that action upon a plea alleging an agreement t suspend the plaintiffs' right to sue in respect of the bil until the 25th of *December*, 1848. [*Maule*, J. Th plea avers that the causes of action in both actions ar identical. Then it appears that an action was brought and that the defendant pleaded to the action, and ob tained a judgment that he go thereof without day Does not that shew a sufficient bar to the presen action?] It is submitted that it does not. [*Maule*, J The proper answer to the plea would have been, tha the present action was not brought for the same caus as the former. The effect of an agreement to suspen the remedy operating as a total bar, was very muc considered in *Ford* v. *Beech*, in error,—where the cas of *Stracy* v. *The Bank of England* (*a*) was explained and materially qualified. (*b*)] It sufficiently appears o the face of the pleadings here, that this is not for th same cause of action as the former. An estoppe operates to prevent a party from alleging a fact contrar to what he has before alleged or admitted. [*Cresswell*, J. Are you suing in this action for the same cause as in the first action?] No. [*Cresswell*, J. Then, why not traverse the allegation of identity?] It could not be necessary, when the record as it stands clearly shews that th two causes of action are different. Would it be for th jury to say whether or not the two declarations were th same? [*Maule*, J. I think it would.] Suppose a fi action brought by the plaintiff as executor, and turned out that he now claimed under letters of admi stration? [*Cresswell*, J. In that case, he would be a ferent person: the cause of action would be tot different.] *Robinson*'s case (*c*) is an authority to sh

(*a*) 6 *Bingh.* 754., 4 *M.* & *P.* 639.

(*b*) 11 *Q. B.* 874.

(*c*) 5 *Co. Rep.* 32. b.

that, in the case put, the judgment in the former action would be no bar to a second.

Wood, in reply, was stopped by the court.

MAULE, J. It appears to me that the plea in this case is good, and that the replication is a bad one. The action is brought, in the ordinary form, upon a bill of exchange. The plea, in effect, states that the plaintiffs had brought a former action against the defendant for the same cause of action, and that in that action the defendant obtained judgment. The plea goes, perhaps unnecessarily, into a detail of the grounds on which the judgment in the former action was given. I think, that, upon whatever ground that judgment was given, the causes of action being alleged to be the same as in the present case, and that allegation not being traversed, and there being no incongruity in assuming the two causes of action to be the same, the judgment operates as a bar. When a court of competent jurisdiction has given judgment that the defendant go without day, and that judgment remains unreversed, it must be taken to have been rightly given, and the plaintiff cannot have a second action for the same cause. The replication, therefore, in the present case, not denying that the cause of action in respect of which the plaintiffs now declare, was the same as that for which the defendant has obtained judgment, affords no answer to the plea; and consequently there must be judgment for the defendant.

CRESSWELL, J. I am of the same opinion. The plaintiffs have sued and have failed, the defendant having obtained judgment. The declaration in the present action seems to be for the same cause of action as the former: the plea avers that it is so; and the

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replication does not deny it. In *Robinson*'s case, it appeared upon the face of the pleadings that the two causes of action *could not* be identical.

TALFOURD, J. I am of the same opinion. The causes of action must have been the same or different. If the same, the judgment in the former action is a bar: if different, the allegation of identity might properly be traversed by the replication. The plaintiff not having adopted that very obvious course, there must be judgment for the defendant.

Judgment for the defendant.

Ex parte KEIGHLEY, *in re* KEIGHLEY *v.* GOODMAN.

Feb. 25.

The 91st section of the county-court act, 9 & 10 *Vict. c.* 95., does not preclude an attorney from recovering from his client a reasonable remuneration for his work and labour done *out of court*, before the institution of a suit, or take away the right of the superior courts to allow on taxation a reasonable remuneration for this description of labour.

ON the 28th of *November*, 1848, *Keighley* delivered to *Goodman* two bills of costs,—the one, of 73*l.* 9*s.* 2*d.*, for general business; the other, of 20*l.* 19*s.* 2*d.*, for business done in relation to a suit in the *Edmonton* county-court, wherein *Goodman* sought to recover damages against one *Martin* for an excessive distress upon goods in the possession of *Goodman* under a mortgage-deed. In the suit in the county-court, *Goodman* claimed, and recovered, 19*l.* 19*s.*, being 12*l.* 10*s.*, the sum levied beyond the amount due for rent, and 7*l.* 9*s.* for damages, — that sum having been charged by *Keighley* for investigating the matter on his behalf, — together with 6*l.* 2*s.* 4*d.* for costs.

On the 5th of *April*, 1849, *Keighley* brought an action against *Goodman*, in this court, to recover the sum of 56*l.*

1*s.* 6*d.*, the balance alleged to be due to him upon the above bills. On the 14th, the first bill was taxed by Master *Methold*, under an order of *Coltman*, J., and 9*l.* 6*s.* 6*d.* struck off. On the 23rd of *April*, *Maule*, J., made an order for the taxation of the second bill; and, on the 10th of *May*, the parties attended before Master *Park*, who disallowed the whole bill, making the following indorsement on the order:—"I certify that I have disallowed the whole of the bill of costs (20*l.* 19*s.* 2*d.*) under this order, because I consider that the act 9 & 10 *Vict. c.* 95. *s.* 91. limits the remuneration of the attorney to 15*s.*

The master's allocatur was as follows:—

	£	s.	d.	£	s.	d.
"14th *May*, 1849. Amount of bill ordered to be taxed by this order -	-		-	73	9	2
"Ditto of bill under order of 23rd *April* - - - -	-		-	20	19	2
				94	8	4
"Taxed off first bill - - -	9	6	6			
"Disallowed on second bill -	20	19	2	30	5	8
				64	2	8
"Add costs of action - -	-		-	2	6	6
				66	9	2
"Deduct costs of taxation -	-		-	10	2	4
				56	6	10
"Cr. by cash of Mr. *Murrell* -	12	5	6			
" of county-court -	26	1	4	38	6	10
"Balance due to Mr. *Keighley* -				£18	0	0

When the parties were before the master, *Goodman* claimed credit only for the sum of 12*l.* 5*s.* 6*d.* received of Mr. *Murrell*, and 19*l.* 19*s.*, the damages awarded to him in the county-court,—making together 33*l.* 4*s.* 6*d.*; but Mr. *Keighley* insisted upon giving credit for the whole amount received from the clerk of the county-court,—26*l.* 1*s.* 4*d.*: and, after the taxation, *Goodman*

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tendered to *Keighley* the amount found due by the allocatur, and the further sum of 6*l.* 2*s.* 4*d.*, together, 24*l.* 2*s.* 4*d.*; which sum *Keighley* refused to accept.

J. Brown, in *Trinity* term last, moved, on behalf of *Keighley*, for a rule calling upon *Goodman* to shew cause why the master should not be at liberty to review his taxation. He submitted that the master had taken an erroneous view of the 91st section of the 9 & 10 *Vict. c.* 95.(*a*), the scale of fees in schedule (D.) shewing that more than the sums mentioned in that section must be actually disbursed before a judgment could be obtained in the county-court. [*Maule*, J. How much is charged in the bill for "appearing and acting" in the county-court?] The bill is not so framed as to shew what is the precise sum charged for the attorney's mere

(*a*) Which enacts "that no person shall be entitled to appear for any other party to any proceeding in any of the said courts, unless he be an attorney of one of Her Majesty's superior courts of record, or a barrister-at-law instructed by such attorney on behalf of the party, or, by leave of the judge, any other person allowed by the judge to appear instead of such party; but no barrister, attorney, or other person, except by leave of the judge, shall be entitled to be heard to argue any question as counsel for any other person in any proceeding in any court holden under this act: and no person not being an attorney admitted to one of Her Majesty's superior courts of record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court: and no attorney shall be entitled to have or recover therefore any sum of money, unless the debt or damage claimed shall be more than 40*s.*, or to have or recover more than 10*s.* for his fees and costs, unless the debt or damage claimed shall be more than 5*l.*, or more than 15*s.* in any case within the summary jurisdiction given by this act; and in no case shall any fee exceeding 1*l.* 3*s.* be allowed for employing barrister as counsel in the cause: and the expense of employing a barrister or an attorney, either by plaintiff or defendant, shall not be allowed on taxation of costs, in the case of a plaintiff, where less than 5*l.* is recovered, or, in the case of a defendant, where less than 5*l.* is claimed, or, in any case, unless by order of the judge.

appearance in court. The court of Queen's Bench, in a case of *Ex parte Clipperton, in re Green* (*a*), decided that this section of the act applies to costs between attorney and client, and includes every thing that is done by the attorney in regard to a suit in that court, whether before, or at, or after the hearing. That clearly is not a correct view of the statute. [*Maule*, J. I should certainly say that appearing and acting in court, must be something different from business done in the attorney's office. *Wilde*, C. J. These regulations would seem to be applicable only as between party and party. *Maule*, J. It is not incident to a court to tax costs as between attorney and client.]

A rule nisi having been granted,

Byles, Serjt., in the course of the same term, shewed cause. The words of the 91st section are clear and precise, that the attorney shall in no case be allowed, on taxation, more than 15*s*., for appearing or acting on behalf of any other person in the county-court. [*Maule*, J. Is he to have 15*s*. only, or 15*s*. *plus* the expenses out of pocket?] Fifteen shillings *plus* the expenses out of pocket. The court of Queen's Bench has, in the case referred to, put a construction upon the statute, which must govern this case, *viz*. that the prescribed fee includes every thing that is done by the attorney in relation to the suit, whether before, or at, or after the hearing. *Patteson*, J., in delivering the judgment of the court, there says: "The words of the section are very clear, — 'that no attorney shall be entitled to have or recover therefore' (that is, for appearing or acting on behalf of any other person in the county-court,) more than the sums there specified, which have been allowed by the master. We are of

(*a*) 12 *Jurist*, 1044.

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opinion that the legislature did not intend to make any distinction between an attorney's right to recover from the opposite party, and from his own client. We think that the costs intended to be allowed between party and party, in regard to the attorneys, are, all such costs as such attorneys are entitled to receive from their clients; and that the latter part of the section, which requires the order of a judge for the allowance of such costs as between party and party, was meant as a further check against the unnecessary employment of attorneys, but does not limit and control the preceding part of the clause. We are further of opinion that the words 'acting for any other person in the county-court' include every thing that is done by the attorney in regard to a suit in that court, whether before, or at, or after the hearing." [*Wilde*, C. J. I must confess I should have thought that the 91st section applied only to taxations in the county-court, and had nothing to do with costs as between attorney and client.] The case of *in re Green*, is plainly in accordance with the real intention of the legislature. [*Wilde*, C. J. The clause seems to contemplate that the attorney would be no more employed before the hearing than the barrister is.] It may be so. [*Wilde*, C. J. Suppose the attorney does not appear at all in court, is he to have nothing for his trouble in investigating and advising?] The policy of the statute was, to discourage the employment of professional men in these local courts. [*Wilde*, C. J. The effect of your construction of the 91st section would be, to drive the suitors into the hands of parties who certainly are not the best calcu lated to promote their interests.] Whatever the conse quence may be, the court will not, with a view to av a supposed inconvenience, reject the natural and obvi construction of the clause.

J. Brown, in support of his rule. The 91st section clearly applies only to costs incurred after the levying the plaint in the county-court. The case of *in re Green* could not have been well considered; and it is not exactly parallel with this case: the items that were objected to there, were, for writing two letters, and for instructions to sue.

WILDE, C. J. Considering that the point is one of very general interest, and that the case referred to is somewhat loosely reported, we will take time to deliberate, and to ascertain what was really decided by the court of Queen's Bench.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the court (*a*): —

This was a motion to review the taxation of an attorney's bill. The master had disallowed certain items for business done in conducting preliminary inquiries before commencing a suit in one of the county-courts established under the act of 9 & 10 *Vict. c.* 95. The ground of the disallowance was, that the 91st section of that act prevented the attorney from having or recovering, for the services in question, any larger sum than 15*s*. And this construction of the section appears to have been adopted by the court of Queen's Bench, in the case of *Ex parte Clipperton, in re Green*, for which we were referred to *The Jurist*, Vol. 12, p. 1044.

Having heard the case argued on this question, and having taken time to consider it, we find ourselves compelled to adopt a different construction of the

(*a*) The judges present at the argument, were, *Wilde*, C. J., *Coltman*, J., *Maule*, J., and *Williams*, J. *Coltman*, J., had died before the judgment was prepared.

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section in question. That section begins by providing that no person but an attorney, or a barrister instructed by one, or a person allowed by the judge to appear instead of such party, shall be entitled to appear in a county-court, for any other party: and such person is, by the next clause, restricted from being entitled to be heard to argue a question as counsel, without leave of the judge. This is followed by a clause in the following words, — "and no person, not being an attorney admitted in one of Her Majesty's superior courts of record, shall be entitled to have or recover any sum of money for *appearing or acting* on behalf of any other person in the said court; and no attorney shall be entitled to have or recover *therefore* any sum of money, unless the debt or damage claimed shall be more than 40*s.*, or to have or recover more than 10*s.* for his fees and costs, unless the debt or damage claimed shall be more than 5*l.*, or more than 15*s.* in any case within the summary jurisdiction given by this act." The section then goes on to provide that no fee exceeding 1*l.* 3*s.* 6*d.* shall be allowed for employing a barrister "*as counsel in the cause*," and that the expense of employing a barrister or attorney shall not be allowed, on taxation of costs, unless 5*l.* is recovered or claimed, or without the order of the judge.

The first clause, — regarding the description of persons who may be allowed to appear in the county-court, for another party, or instead of such party, — seems very clearly to apply only to the appearance in the court as a representative of a party who would otherwise be obliged to appear for himself. The next provision, restricting the right to be heard to argue as counsel, also evidently applies only to a proceeding in court. The clause in question begins with this provision, — "and no person, not being an attorney, admitted, &c., shall be entitled to have or recover any sum of money for *appearing or acting on behalf of any*

other person in the said court." These words, certainly, in their literal construction, apply only to what is done *in the court:* and this is not only the literal sense, but the natural and obvious sense of the words; and the subject of the preceding part of the section being matters in court only, confirms this construction: indeed, it would be difficult, by affirmative words, more expressly to confine the enactment to what is done *in court*, than by those actually used, — "appearing or acting on behalf of any other person *in the said court.*" The words next following, on which the present question immediately arises, are, — "And no attorney shall be entitled to have or recover *therefore* any sum of money, unless the debt or damage claimed shall be more than 40*s.*, or to have or recover more than 10*s.* *for his fees and costs* unless the debt or damage claimed shall be more than 5*l.*, or more than 15*s.* in any case within the summary jurisdiction given by this act." Here, the word "therefore" clearly is intended to refer to the preceding words, "for appearing or acting on behalf of any other person in the said court:" so that the right to have or recover anything in cases not above 40*s.*, is also taken away only in respect of the appearing or acting *in court* on behalf of the party to the suit. It is true that the word "therefore" is not repeated in the provision as to cases where 10*s.* or 15*s.* may be had or recovered; the words being, — to have or recover more than 10*s.* "for his fees and costs," without saying "therefore." But it appears to us that this provision is to be considered as applying to fees and costs for appearing and acting on behalf of any other person *in the said court.* If this were not so, it would follow, that, in cases not exceeding 40*s.*, an attorney might recover for what was done out of court, but not in cases exceeding that amount. (*a*) Indeed, the

(*a*) *Quære.*

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court of Queen's Bench, as reported in *The J* seem to have considered that the restriction of fe 10*s.* and 15*s.*, as well as the preceding one, deprives the attorney of any claim in cases not ex ing 40*s.*, should be understood of fees "for appe and acting *in court* on behalf of another," and exp that opinion in the commencement of their judgm observing that "the words of the section are very that no attorney shall be entitled to have or re *therefore* (that is, for appearing or acting on beh any other person *in the county-court,*) more tha sums therein specified."

It appears, therefore, on considering the words enactment, taking the language of the legislature ordinary sense, that the restriction in question doe apply to business done out of court, before a s commenced: and we think, that, looking at the ge scope of the enactment, we ought to come to a si conclusion.

The subject of the section, is, proceedings in co courts, — a very fit subject of regulation in an a establishing such courts. The act certainly con plates that the hearing of cases in the county-c will usually be short and summary. The limitati fees for acting for a party at such a hearing, is a ne incident to such courts; and such limitations ar unusual in respect of proceedings in courts. where one man employs another to do work and la for him, for a reasonable remuneration, it seems reasonable to say the contract shall *not* be binding i employment end in a suit in a county-court, but w binding if it do not. We think such a restrictio this would be, on the liberty of entering into contracts as the parties think fit, ought not t implied, unless by a necessary implication; and the none such here.

The court of Queen's Bench is reported to have said, in *Ex parte Clipperton, in re Green*, that the legislature did not intend to make any distinction between an attorney's right to recover from the opposite party, and from his own client: but we think there is no reason for construing the act as abolishing the existing distinction between the costs which may be allowed between party and party, and the remuneration which an attorney may recover from his client. The framers of the act use appropriate words, in speaking of both kinds of claim, — the attorney's claim against his client being described as a right "to have or recover," while costs between party and party are described as costs "allowed on taxation."

On the whole, we think there is nothing in this section to take away the right of an attorney to be paid a reasonable amount for work done out of court, before the institution of a suit, or to take away the right of the superior courts, — which alone have jurisdiction to tax attorneys' bills, — to allow a reasonable remuneration for this description of labour. The rule must, therefore, be made absolute.

Rule absolute.

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TEMPLE *v.* SLEIGH.

Jan. 25.

A certificate under the debtors' arrangement act (7 & 8 *Vict. c.* 70. *s.* 13.) must certify *the filing of the petition*, and not merely that a resolution or agreement was duly assented to, and approved and filed by the commissioner.

Quære, whether a certificate under this act requires *confirmation*, — or whether a plea setting up such a certificate, need shew that the debt is not of the excepted classes mentioned in *s.* 2.?

ASSUMPSIT on a bill of exchange for 150*l.*, bearing date the 25th of *July*, 1846, drawn by the defendant upon one *W. W. Sleigh*, payable one month after date, and indorsed to the plaintiff; with a count upon an account stated.

The defendant pleaded, amongst other pleas, that, after the bill of exchange in the first count of the declaration became due and payable according to the tenor and effect thereof, and after the making of the promise in the last count of the declaration, and after the passing of a certain act of parliament made and passed in a session of parliament holden in the seventh and eighth years of the reign of Her present Majesty, intituled "An act for facilitating arrangements between debtors and creditors," and before the commencement of this suit, to wit, on the 18th of *October*, 1847, the defendant, being a debtor unable to meet his engagements with his creditors, and not being a trader within the meaning of the statutes in force relating to bankrupts at the time of the passing the said act, with the concurrence of one third in number and value of his creditors (testified by their having signed his petition), did present to the court of bankruptcy a petition setting forth a full account of his debts, and the consideration thereof, and the names, residences, and occupations of his creditors, and particularly stating the name, residence, and occupation of the plaintiff, and an account of the plaintiff's alleged debt, and the consideration thereof, and also a full account of his, the defendant's, estate and effects, whether in possession, reversion, or

expectancy, and of all debts and rights due to or claimed by him, and of all property, of what kind soever, held in trust for him, and also setting forth that he was unable to meet his engagements with his creditors, and the true cause of such inability, and also setting forth a certain proposal which he, the defendant, then made for the compromise of his said debts and engagements, and also setting forth that one third in number and value of his creditors had assented to his said proposal; and which petition prayed that his said proposal, or such modification thereof as by the majority of his creditors should be determined, should be carried into effect under the superintendence and control of the said court, and that he, the defendant, should in the meantime be protected from arrest, by order of the said court: That the said petition was afterwards, to wit, on the day and year last aforesaid, and before the commencement of this suit, duly filed of record in the said court; and that *H. J. Shepherd*, Esq., — the said *H. J. Shepherd* then being one of the commissioners of the said court, and the commissioner acting in the matter of the said petition, — did, upon the presentation of the said petition, to wit, on the day and year last aforesaid, privately examine into the truth of the several matters alleged in the said petition; and that the said *H. J. Shepherd*, — being satisfied of the truth of the said several matters in the said petition alleged, and that the debts of the defendant had not been contracted by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a *fiat* in bankruptcy, or malicious

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trespass, and that the defendant had made a full disclosure of his debts and credits, estate and effects, and was desirous of making a *bonâ fide* arrangement with all his creditors, and that his proposal to that effect was reasonable and proper to be executed under the direction of the said court, — did thereupon direct a meeting of all the creditors of the said defendant to be convened according to the provisions of the said act, and that such meeting should be holden, to wit, on the 3rd of *November*, 1847, at the office of *G. J. Graham*, at No. 25. *Coleman Street*, in the city of *London*, — the said *G. J. Graham* then being one of the official assignees of the said court of bankruptcy; and that the defendant should give notice in writing to every creditor of him the defendant, not less than seven or more than twenty-eight days before the holding of such meeting: That afterwards, and before the commencement of this suit, to wit, on the said 18th of *October*, 1847, the said *H. J. Shepherd* did appoint the said *G. J. Graham* (the said *G. J. Graham* then being one of the official assignees of the said court of bankruptcy) to preside at such meeting of creditors, and to report the resolutions thereof to the said *H. J. Shepherd*, Esq.: That, in pursuance of such direction of the said *H. J. Shepherd*, as aforesaid, and according to the provisions of the said act, he, the defendant, gave notice in writing to every creditor of him, the defendant, and particularly to the said plaintiff, of such intended meeting, and of the time and place of holding the same, not less than seven, or more than twenty-eight days before the holding of such meeting: That a meeting of the creditors of the said defendant was afterwards, and before the commencement of this suit, to wit, on the 3rd of *November*, 1847, at the office of the said *G. J. Graham*, No. 25. *Coleman Street*, in the city of *London*, convened and held; at which meeting the said *G. J.*

Graham did preside: That, at the said meeting, the major part in number and value of the creditors of the said defendant did assent to the proposal of the said defendant; and that thereupon the said *G. J. Graham* did, according to the provisions of the said act, appoint another meeting of the creditors of the said defendant to be convened and held under the provisions and directions of the 4th section of the said act, not earlier than seven or later than twenty-eight days from such last-mentioned meeting: That of such second meeting, and the purpose thereof, he, the defendant, did give notice in writing, and did personally serve the same on every creditor who was not present, by himself or his appointed agent, at such first meeting, and particularly on the plaintiff, three clear days at least before the day appointed for such second meeting: That such second meeting was convened and held according to the provisions of the said act; and, at the said second meeting, three fifths in number and value of all the said defendant's creditors then present, — the said creditors so present being one full third in number and value of all the creditors of the defendant, — did agree to accept such composition as was assented to at the said first meeting of creditors: That the said creditors so present at such second meeting, — the same being three fifths in number and value of all the creditors of the defendant, — did reduce the terms of the said composition into writing, and signed the same: That, afterwards, and before the commencement of this suit, and within fifteen days next after the said agreement for acceptance of the said composition, and the signing of the same at the said second meeting of creditors, the same agreement was submitted to the said *H. J. Shepherd*, the commissioner acting in the matter of the said petition; and the said *H. J. Shepherd* did afterwards, and before the commencement of this suit, to

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wit, on the 18th of *November*, 1847, cause the said agreement and resolution to be filed and entered of record in the said court of bankruptcy, and did grant to the said defendant a certificate of such filing, and indorsed on such certificate his protection of the said defendant from arrest: That, afterwards, and before the commencement of this suit, to wit, on the 18th of *December*, 1847, the said agreement was carried into effect, and the creditors of the said defendant were satisfied according to the tenor of the same; and that thereupon the said *H. J. Shepherd*, the commissioner acting in the matter of the said petition, did cause a meeting of the said creditors of the defendant to be held before him on the 25th of *February*, 1848, at which meeting the said *H. J. Shepherd*, — the same meeting being before the commencement of this suit, and the said *H. J. Shepherd*, then being the commissioner of the court of bankruptcy acting in the matter of the said petition, — did give to the said defendant a certificate under his hand and seal, certifying *that he, the said H. J. Shepherd, had caused such meetings of the creditors of the defendant to be held as are directed by the said act, and that a certain resolution or agreement had been duly assented to at such meeting, as he the said H. J. Shepherd thought reasonable and proper to be executed under the direction of the said act, that he the said H. J. Shepherd had caused the same to be filed and entered of record, and that the said resolution or agreement had been fully carried into effect* (*a*), — verification.

To this plea the plaintiff demurred specially, assigning for causes, — that it does not appear in and by the plea, that the said petition of the defendant set forth such proposal as he at the time of presenting his said petition

(*a*) See note (*a*) at the end of the case.

was able to make for the future payment or the compromise of his debts or engagements, or that the proposal in the said petition set forth was the proposal which, at the time of the prosecuting the said petition, the defendant was, most beneficially to his creditors, able to make; that it appears thereby that the said petition only set forth a certain proposal which he the defendant then actually made for the compromise of his said debts and engagements, and that it is quite consistent with the said plea, that the defendant was, at the time of presenting his said petition, able to carry into effect a proposal more beneficial to his creditors than the proposal in the said petition set forth, or that he was unable to carry into effect the said proposal, or any modification of the same: — That it is not averred in, or shewn by, the plea that the said resolution or agreement therein mentioned, embodied the very terms of, or was equivalent to, the proposal in the said petition of the defendant mentioned, or was in fact a modification of such proposal, and it is quite consistent with the plea, that the said resolution or agreement was neither substantially identical with, nor a modification of, the said proposal: — That it is not averred in, or shewn by, the plea, that the said *H. J. Shepherd*, when he the said *H. J. Shepherd*, as in the plea alleged, privately examined into the truth of the several matters alleged in the said petition, did examine the defendant upon oath, and any creditor concurring in his petition, and any witness then produced by the defendant; and that it is quite consistent with the plea, that the said *H. J. Shepherd*, when he privately examined into the truth of the matters alleged in the said petition, did not examine, either upon oath, or at all, the said defendant, or any creditor concurring in his said petition, or any witness then produced by the defendant: — That it is not averred in, or shewn by, the plea, that

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the resolution or agreement therein mentioned contained any terms for the compromise or future payment of the said debt due from the defendant to the plaintiff, or that the same could not be carried into effect, according to the tenor of the same, without in fact satisfying the said debt due from the defendant to the plaintiff: — That it is not averred or shewn in or by the plea, that the plaintiff, before or at the time when the resolution or agreement in the plea mentioned was carried into effect, or at any time by reason of the said resolution or agreement being or having been carried into effect, received any payment or satisfaction, either wholly or in part, of his said debt, and it is perfectly consistent with the plea, that the said resolution or agreement was carried into effect, and that the creditors of the defendant were satisfied, according to the tenor of the same, without any satisfaction or payment of the said debt due from the defendant to the plaintiff, either wholly or in part, being or having been made: — That it does not appear in or by the plea, that *H. J. Shepherd*, in the plea mentioned, had jurisdiction to give to the defendant a certificate, according to the provisions of the 13th section of the said act of parliament; because it does not appear thereby, neither is it shewn therein, that any meeting of the creditors of the defendant was held in pursuance of the directions in the plea alleged to have been given by the said *H. J. Shepherd*: — That it does not appear by the said plea that the defendant is entitled to plead the certificate in the plea last mentioned, in bar of this action, or in discharge of the debt for the recovery of which this action is brought, because it is not shewn or averred in or by the said plea, that the said court of bankruptcy did, in writing under hand and seal, certify to the court of review, or to such one of the vice-chancellors of the high court of Chancery as the lord chancellor had then

been pleased to appoint to exercise all the jurisdictions, powers, authorities, and privileges of the said court of review in bankruptcy, that the defendant had made a full discovery of his estate and effects, and at all times conformed himself to the laws in force at the time of presenting his said petition to the court of bankruptcy, and that there did not appear to be any reason for doubting the truth and fulness of such discovery; and because it is not averred or shewn in or by the said last plea, that the defendant hath made oath in writing that the said certificate in the said plea last mentioned, was obtained fairly and without fraud; and because it is not averred in, or shewn by, the said plea, that the said certificate in the said plea last mentioned, was, after oath made in writing by the defendant that the said certificate in the said plea last mentioned, was obtained fairly and without fraud, confirmed by the court of review, or such one of the vice-chancellors of the high court of Chancery as the lord chancellor had been pleased to appoint to exercise all the jurisdictions, powers, authorities, and privileges of the said court of review in bankruptcy: — That the defendant, by his said plea, seeks to make the certificate therein last mentioned, operate more fully than a certificate of conformity under the statutes relating to bankrupts: — And that it does not appear by the said plea, that the defendant is entitled to plead a certificate under the provisions of the 13th section of the said act of parliament, in bar of this action, or of the debt for the recovery of which this action is brought, because it is not averred or shewn in or by the said plea, that the debt for the recovery of which this action is brought, is not a debt in the said act of parliament excepted from the operation of the said act of parliament.

Joinder in demurrer.

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Keane, in support of the demurrer. The preamble of the statute 7 & 8 *Vict. c.* 70. recites that "it is expedient that trust deeds and other amicable modes of arrangement between debtors and their creditors should be facilitated, and that better means should be provided for carrying the same into effect:" the 1st section then proceeds to enact, "that it shall be lawful for any debtor who is unable to meet his engagements with his creditors,—such debtor not being a trader within the meaning of the statutes now in force relating to bankrupts,—with the concurrence of one third in number and value of his creditors (testified by their signing his petition), to present a petition to the court of bankruptcy, setting forth a full account of his debts, and the consideration thereof, and the names, residences, and occupations of his creditors, and also a full account of his estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by him, and of all property, of what kind soever, held in trust for him; and also setting forth that he is unable to meet his engagements with his creditors, and the true cause of such inability; and also setting forth such proposal as he is able to make for the future payment, or the compromise, of such debts or engagements; and that one third in number and value of his creditors have assented to such proposal; and praying that such proposal (or such modification thereof as by the majority of his creditors should be determined) should be carried into effect under the superintendence and control of the said court; and that he, the said petitioning-debtor, should in the mean time be protected from arrest by order of the said court." The petition set out in this plea does not comply with that section, inasmuch as it does not set forth such proposal as the defendant was able to make for the future payment or the compromise of his debts or engagements. The 2nd section enacts, "that,

upon the presentation of such petition, one of the commissioners of the said court, in such rotation as by order of the said court shall be appointed, shall privately examine into the matter of the said petition, and for that purpose shall have *power* to examine upon oath such petitioning-debtor, and any creditor concurring in his petition, and any witness produced by such petitioning-debtor; and, if such commissioner shall be satisfied of the truth of the several matters alleged in such petition, and that the debts of such petitioning-debtor have not been contracted by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a *fiat* in bankruptcy, or malicious trespass, and that such petitioning-debtor has made a full disclosure of his debts and credits, estate and effects, and is desirous of making a *bonâ fide* arrangement with all his creditors, and that his proposal to that effect is reasonable and proper to be executed under the direction of the said court,—it shall be lawful for such commissioner to direct that a meeting of all the creditors of such petitioning-debtor should be convened at such time and place as the said commissioner shall appoint; notice of which meeting shall be given in writing to every such creditor not less than seven or more than twenty-eight days before the same is held." The 15th section,—the interpretation clause,—provides that the act shall be construed "beneficially to creditors;" that is, that a party availing himself of the benefit of the act, shall proceed with a due regard for the interests of his creditors; and this requirement is not complied with, unless the proposal made is the best the debtor *can*

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make. Under this act, the creditors have not *necessarily* the security of the examination of the debtor, or any witness, upon oath, as they have under the 5 & 6 *Vict. c.* 122. The 4th section of the 7 & 8 *Vict. c.* 70. enacts, "that, if at such meeting of creditors the major part in number and value, or nine tenths in value, or nine tenths in number whose debts exceed 20*l.*, shall assent to the proposal of such petitioning-debtor, or to any modification thereof, the president (*a*) of such meeting shall appoint another meeting of the creditors of such petitioning-debtor, to be held not earlier than seven or later than twenty-eight days from such first meeting, — of which second meeting, and of the purpose thereof, notice in writing shall be personally served on every creditor who was not present, by himself or his appointed agent, at such first meeting, three clear days at least before the day appointed for such second meeting." The 5th section enacts, "that, if, at such second meeting of creditors, three fifths in number and value of all the creditors present, or nine tenths in value, or nine tenths in number whose debts exceed 20*l.*, shall agree to accept such arrangement or composition as was assented to at the said first meeting of creditors, and shall reduce the terms thereof into writing, and sign the same, such resolution or agreement (subject to such confirmation as is hereinafter enacted) shall thenceforth be binding and of full force, as well against the petitioning-debtor as against all persons who were creditors of the said petitioning-debtor at the date of his said petition, and who had notice of the said several meetings of creditors: provided, however, that such resolution or agreement shall not be valid, unless one full third in number and value of all the creditors of such petitioning-debtor were present at such second meeting, either in person or by an authorised agent."

(*a*) Whose appointment is provided for by s. 3.

Sections 6. and 7. provide for the interim protection of the petitioner; and the former enacts that no such protection shall be valid in favour of any petitioning-debtor who shall be proved to have been about to abscond beyond the jurisdiction of the court of bankruptcy, or who has concealed, or is concealing, any part of his estate or effects, nor against any creditor whose debt is not truly specified in the said petition, nor against any creditor whose debt has been contracted by reason of any manner of fraud or breach of trust. The 8th section vests the estate and effects of the petitioner in the trustee, from the filing of the resolution and agreement. The 10th section enacts, "that, if it shall at any time appear to the said commissioner, on the representation of such trustee as aforesaid, or of any two creditors as aforesaid, that such petitioning-debtor has not made a true discovery of his estate and effects, or has not duly accounted for any subsequently-acquired property (if required, by the true intent and meaning of the said resolution or agreement), or has wilfully made any false return of creditors, it shall be lawful for the said commissioner to summon such petitioning-debtor to be examined before him upon oath touching such matters; and such summons and examination shall be enforced in such manner as is now practised in the summoning and examination of bankrupts." The 13th section,—upon which the right to plead the plea now in question is founded,—enacts, "that, at such last-mentioned meeting (*a*), the said commissioner shall give to the said petitioning-debtor a certificate, under the hand and seal of the said commissioner, *of the filing of the said petition*, and *of the resolution or agreement of the creditors* of the said petitioning-debtor, and *that the said resolution or agreement has been fully carried into effect;*

(*a*) A meeting held for the purpose mentioned in s. 12.

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and such certificate shall thenceforth operate to all intents and purposes *as fully* as if the same were a certificate of conformity under the statutes relating to bankrupts, excepting only that no debt herein excepted from the operation of this act shall be barred by the said certificate." The certificate relied on in this plea is not the certificate mentioned in that section: it does not certify *the filing of the petition*, which is to be the foundation of the whole proceeding: neither does it shew, as it is submitted it ought to do, that the certificate was obtained fairly and without fraud, or that it has been confirmed. If these two latter requirements are held unnecessary, the certificate will operate *more fully* than a certificate of conformity under the bankrupt acts,—which is contrary to the declared intention of the legislature. In *Wells* v. *Iggulden* (*a*), a declaration on the 55 *G.* 3. *c.* 137. *s.* 6. (*b*) stated that the defendant,

(*a*) 3 *B.* & *C.* 186., 5 *D.* & *R.* 13.

(*b*) Which enacts, "that no churchwarden or overseer of the poor, or other person or persons in whose hands the collection of the rates for the relief of the poor, or the providing for, ordering, management, control, or direction of the poor of any parish, &c., shall or may be placed jointly with, or independent of, such churchwardens and overseers, or any of them, under or by virtue of any act or acts of parliament, shall, either in his own name, or in the name of any other person or persons, provide, furnish, or supply, for his or their own profit, any goods, materials, or provisions for the use of any workhouse or workhouses, or otherwise, for the support and maintenance of the poor in any parish, &c., for which he or they shall be appointed as such, during the time which he or they shall retain such appointment, no shall be concerned, directly or indirectly, in furnishing or supplying the same, or in any contract or contracts relating thereto," under the penalty of 100*l.* "Provided nevertheless, that, if it shall happen in any parish, &c., that a person or persons competent and willing to undertake the supply of any of the articles or things required for such workhouse or workhouses, or for the use of the poor there, cannot be found, within a convenient distance therefrom, other than and except some or one of the churchwardens and overseers of the poor, or other person or persons having the ordering, managing,

being an overseer of the poor of the parish of *A.*, supplied for his own profit provisions for the support of the poor of the said parish, "whereby, and by force of the statute in such case made and provided, he forfeited for his said offence 100*l.*, and thereby, and by force of the statute, an action had accrued," &c.: upon motion in arrest of judgment, on the ground, amongst others, that the declaration did not negative the exceptions contained in the 6th section of the act, it was contended, for the plaintiff, that the exception, coming by way of proviso, and being incorporated with that part of the act which created the offence, the plaintiff was not bound to take notice of it in his declaration. On the other hand, it was insisted that the declaration should have negatived the exceptions, they being contained in the same section which creates the offence. But *Holroyd*, J., said (*a*): "The exception is totally separate from the enactment; it was not, therefore, necessary for the plaintiff to negative it. Had it formed a qualification of that which went before, and been incorporated with it, then it would have been necessary, according to the rule laid down in *Stowel* v. *Lord Zouch* (*b*), and *Newis* v. *Lark*." (*c*) And *Bayley*, J., added: "Upon that point I have no doubt: statutes are not divided into

control, or direction of the poor in such parish, &c., then and in every such case, it shall and may be lawful to and for any two or more neighbouring justices of the peace (proof thereof having been first duly made before them upon oath, &c.), by certificate under their hands and seals, to permit and suffer any one or more of such churchwardens and overseers, or other such person or persons as aforesaid, to contract and agree for the furnishing and supplying of any articles or things which may be required for such workhouse or workhouses, or otherwise for the use of the poor of such parish, &c., during the time which he or they may retain such appointment; any thing therein contained to the contrary, notwithstanding."

(*a*) 3 *B.* & *C.* 188.

(*b*) *Plowd. Comm.* 376. (*per Dyer*, C. J.).

(*c*) *Plowd. Comm.* 410.

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sections upon the rolls of parliament, and therefore the mere placing the proviso in the same section of the printed act, does not make it necessary to notice it in pleading; unless it is also incorporated in the enacting sentence." Here, the *onus* of shewing that he is entitled to the protection of the certificate, is by the whole scope of the act thrown upon the defendant: the creditor can have no means of knowing whether his debtor has contracted debts fraudulently or not; it is therefore expedient that the party who alone possesses the knowledge, should be bound to aver and to prove it.

The 37th section of the 5 & 6 *Vict. c.* 122. enacts "that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force at the time of issuing the *fiat* in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made provable under the *fiat*, in case he shall obtain a certificate of such conformity, so signed and *allowed*, and subject to such provisions as hereinafter mentioned." By section 38., the bankrupt is declared not entitled to a certificate, if he has lost certain amounts by gaming or stock-jobbing, or concealed or destroyed books, &c., or made false entries, or concealed any property, or permitted fictitious debts to be proved. And the 39th section provides "that no certificate shall be such discharge, unless the court (of bankruptcy) shall, in writing under hand and seal, certify to the court of review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be

confirmed by the court of review." The omission of all this is objected against this plea. And the omission is most important; for, should the objection prevail, the commissioner must necessarily take a very different view of his duty under the 2nd section of the 7 & 8 *Vict. c.* 70. [*Cresswell*, J. You contend, as I understand, that, after the certificate is given under this act, the same steps must be taken to obtain its confirmation, as in the case of a certificate of conformity under the bankrupt acts?] Precisely so. [*Wilde*, C. J. In short, that it is no certificate at all until confirmation?] It may before confirmation operate a limited protection of the debtor, in the way pointed out in the 42nd section of the 5 & 6 *Vict. c.* 122. But, under the 37th section of that act, the *confirmation* must be pleaded, as well as the allowance of the certificate. And, by the interpretation clause of the act now in question, s. 15., it is enacted, that, "if any doubts should arise in the construction thereof, it shall be construed by analogy to the laws now in force relating to bankrupts, and the practice thereof."

Bernard, contrà. [*Wilde*, C. J. Have you addressed your attention to the fact of the certificate stated in the plea, being merely a certificate that a certain resolution or agreement was duly assented to at the meeting of the creditors, which the commissioner thought reasonable, and that the commissioner had caused the same to be filed and entered of record, — instead of a certificate, as required by s. 13., of *the filing of the petition*, and of the resolution or agreement? Had you not better amend your plea?] The plea certainly does seem to be defective in that respect. [*Maule* J. If you elect to amend, you may probably think it worth your while to amend also with respect to the omission to negative

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the debts being of one of the excepted classes. That seems to me to be doubtful.]

Bernard elected to amend, on the usual terms.

Rule accordingly. (*a*)

(*a*) The plea was afterwards amended, the amendment consisting of the substitution for the words in *italics*, *antè*, p. 352., of the following, — "the filing of the said petition of the defendant, and of the said resolution or agreement of the creditors of the defendant, and that the said resolution or agreement had been fully carried into effect."

The amended plea was demurred to: but the matter was ultimately arranged.

KIDGILL *v.* MOOR, Clerk.

Feb. 11.

A declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant; and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way; and that, by means of the premises, the plaintiff was injured in his reversionary estate: — Held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction *might* occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given.

THIS was an action upon the case, by a reversioner, for an obstruction of an alleged right of way.

The declaration stated, that, before and at the time of the committing of the grievances by the defendant as thereinafter mentioned, the plaintiff was, and continually from thence hitherto had been, and still remained, seised in his demesne as of fee of and in one undivided seventh part, the whole into seven equal parts to be divided, of a certain close and premises, with the appurtenances, situate in the parish of *Bradfield*, in the county of *Berks*, as tenant in common thereof with *William Kidgill*, &c., the said *William Kidgill*, &c.

then being possessed of the other six undivided parts of the said close and premises, with the appurtenances; that the said undivided seventh part of the said close and premises, with the appurtenances, during all the time aforesaid, was, and still remained, in the possession and occupation of *Joseph Kidgill*, as tenant thereof to the plaintiff, the reversion thereof, expectant on the determination of the said tenancy, then and still belonging to the plaintiff; and that the plaintiff, during all the time aforesaid, of right ought to have had, and yet of right ought to have, for his tenants, occupiers of the said undivided seventh part of the said close, &c., a certain way from and out of the said close, unto, into, through, and over a certain other close of the defendant, in the parish aforesaid, from and out of the same, unto and into a certain common and public highway in the county aforesaid, and so back again from the same common and public highway, unto, into, through, and over the said close of the defendant, unto and into the said first-mentioned close and premises, to go, pass, and re-pass, on foot, with horses, waggons, and carriages, every year, and at all times of the year, at their free will and pleasure: yet that the defendant, well knowing the premises, but wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his said reversionary estate and interest of and in the said undivided seventh part of the said close and premises, with the appurtenances, whilst the said undivided seventh part of the said close was so in the possession and occupation of the said *Joseph Kidgill* as tenant thereof to the plaintiff, and whilst he, the plaintiff, was so interested in the said undivided seventh part of the same, as aforesaid, to wit, on the 1st of *May*, 1849, and on divers days and times between that day and the commencement of this suit, wrongfully and unjustly locked, chained, shut, and fastened a certain gate stand-

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ing in and across the said way, and wrongfully and injuriously kept and continued the said gate so locked, chained, shut, and fastened, in and upon the said way, for a long space of time, to wit, from thence until the commencement of this suit, and thereby during all that time wrongfully and injuriously obstructed the said way, — by means of which said several premises the plaintiff had been and was greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest of and in the said undivided seventh part of the said close and premises, with the appurtenances, so in the possession of the said *Joseph Kidgill* as tenant thereof to the plaintiff; and also by means of the committing of the said grievances by the defendant as aforesaid, one *J. G. Lewis*, who, before the committing of the said grievances by the defendant, had contracted and agreed with the plaintiff for the purchase by him from the plaintiff of the said reversionary estate and interest of the plaintiff, for a large sum of money, to wit, the sum of 300*l.*, and who would otherwise have completed the said purchase, and have paid to the plaintiff the said sum of money, was deterred and prevented from completing the said purchase, and from paying the said sum of money to the plaintiff, and from thence continually had wholly declined to complete the said purchase, or to pay the said sum of money, or any part thereof, to the plaintiff; and thereby the plaintiff had been, and still was, hindered and prevented from completing the sale of his said reversionary estate and interest to the said *J. G. Lewis*, and had thereby not only lost and been deprived of the advantage and emoluments which he would have derived and acquired from the completion of the sale of his said reversionary estate and interest to the said *J. G. Lewis*, but had been forced and obliged to pay, lay out, and expend divers large sums of money, to wit, the sum of 100*l.*,

in and about the said contract for the sale of his said reversionary estate and interest, and expenses incidental thereto, — to the damage of the plaintiff of 200*l.*, &c.

The defendant pleaded, — first, not guilty, — secondly, a plea traversing the seisin of the plaintiff as alleged in the declaration, — thirdly, a traverse of the alleged right of way: whereupon issue was joined.

The cause was tried before *Rolfe*, B., at the summer assises for the county of *Berks*, in 1849, when a verdict was found for the plaintiff upon all the issues, damages 40*s.*

Whateley, in *Michaelmas* term last, obtained a rule nisi to arrest the judgment (*a*), on the ground that the declaration disclosed no cause of action, — the alleged obstruction of the right of way not being shewn to be an injury of a permanent nature, so as to affect the reversion. He cited *Jesser* v. *Gifford* (*b*), *Jackson* v. *Pesked* (*c*), *Baxter* v. *Taylor* (*d*), *Bright* v. *Walker* (*e*), and *Tucker* v. *Newman.* (*g*)

Keating and *Matthews* now shewed cause. The complaint here is, that the defendant wrongfully fastened a gate erected across a way leading over the defendant's close; whereby the plaintiff's reversionary estate was injured: and the question will be, whether such an obstruction could, under any circumstances, be an injury to the reversion. One of the earliest authorities upon this subject, is, the case of *Jesser* v. *Gifford.* (*b*) That was an action for erecting a wall, whereby the plaintiff's

(*a*) He also moved for a new trial, on the ground that the verdict was against the weight of evidence; but the rule as for a new trial was refused.

(*b*) 4 *Burr.* 2141.

(*c*) 1 *M. & Selw.* 234.

(*d*) 4 *B. & Ad.* 72., 1 *N. & M.* 11.

(*e*) 1 *C. M. & R.* 211., 4 *Tyrwh.* 509.

(*g*) 11 *Ad. & E.* 40.

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lights were obstructed. A motion was made in arrest of judgment, on the ground that the action would not lie by a *reversioner*, being only an injury to the person in *possession*. But *Aston*, J., afterwards said "he had looked into it, and had found a case S. P. with the present; and accordingly cited *Tomlinson* v. *Brown* (*a*): it was an action brought by the owner of the inheritance, for a nuisance in obstructing lights and breaking his wall. A general verdict for the plaintiff. Mr. *Norton*, in arrest of judgment, objected that a temporary nuisance cannot be an injury to the inheritance; it may be abated before the estate comes into possession: and he cited *Some* v. *Barwish* (*b*); and observed, that, if this would hold, the defendant would be liable to a *double* action, — one, by the possessor of the estate, — the other, by the reversioner. Mr. *Crowle* shewed cause on behalf of the plaintiff, and insisted that it was a damage done to the *inheritance:* if the reversioner wanted to sell the reversion, this would certainly *lessen the value* of it. The court were of opinion that an action might be brought by one in respect of his possession, and by the other in respect of his inheritance, for the injury done to the value of it." And Lord *Mansfield* added: "That is decisive;" and the rule for arresting the judgment was discharged. Can there be any doubt that the erection and fastening of a gate across a way may be as permanent an obstruction to the right, and consequently as great an injury to the reversion, as the building of a wall? This is not like the case of an attempt to gain a right on the *plaintiff's* land. [*Maule*, J. In the case of an obstruction of lights, the house is permanently the worse for it: but, in the case of an obstruction of a right of way, the plaintiff is only injured if he is obstructed at a time

(*a*) *E. T.* 1755. MS. (*b*) *Cro. Jac.* 231.

when he wants to exercise his right. It is like a profit *à prender:* the commoner must shew that he wanted to use the common, before he can complain of an obstruction to his right. *Cresswell,* J. Would the mere putting a lock upon the gate, no one appearing ever to have been prevented from passing through, enable the reversioner to bring an action?] Whether the act done amounted to an obstruction or not, would be for the jury. [*Maule,* J. The *tenant* clearly could not maintain an action, unless he has been actually obstructed. Could the landlord bring an action alleging an injury to the reversion, where there has been no actual obstruction of the tenant?] It is submitted that he may. [*Maule,* J. Suppose the plaintiff were tenant in fee in possession, he could maintain no action except in respect of some actual obstruction of his right. Could he in such case acquire a right of action by simply parting with the right of possession?] After verdict, the court will assume here an obstruction as permanent as the terms used will admit of. In 1 *Wms. Saund.* 346 *a.* (*a*), the learned editors, treating of the action by a commoner for the disturbance of his right, say: "The consumption of the grass by the other cattle, is of itself a diminution of the right and profit of the commoner, and considered as sufficient proof of the damage alleged in the declaration; for, if the other cattle had not been there, the commoner's cattle might have eaten every blade of grass which was consumed by the other. Therefore, it seems sufficient for the plaintiff to prove his right to the common, and that the defendant put upon it cattle, or (if he be another commoner) more cattle than he ought to do. Besides, the law considers that the *right* of the commoner is injured by such an act, and therefore allows

(*a*) Notes to *Mellor* v. *Spateman.*

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him to bring an action for it, to prevent a wrong-doer from gaining a right by repeated acts of incroachment: *Wells* v. *Watling* (a); *Hobson* v. *Todd* (b); *Pindar* v. *Wadsworth.* (c) For, wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific injury: and this seems to be a governing principle in cases of this kind. As in the case of *Patrick* v. *Greenway* (d), which was an action of trespass for fishing in the plaintiff's several fishery: it appeared in evidence that the defendant fished there, but did not take any fish; neither was it alleged in the declaration that the defendant caught any fish: the plaintiff obtained a verdict, which in the following term (*Easter*, 1796) the defendant moved to set aside: but the court of Common Pleas refused even a rule to shew cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of an using and exercising of the right by the defendant, if such an act were overlooked." In *Young* v. *Spencer* (e), in case by the owner of a house, against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises, — upon a plea of not guilty, the jury found that the lessee did open the door without leave, but that the house was not in any respect weakened or injured by it; and the judge thereupon directed a verdict to be entered for the plaintiff, with nominal damages, subject to a case: and it was held, on argument, that the plaintiff was not, at all events, entitled to

(a) 2 *W. Blac.* 1233.
(b) 4 *T. R.* 71.
(c) 2 *East*, 154.
(d) Tried before *Lawrence*, J., *Oxford* Spring assises, 1796.
(e) 10 *B. & C.* 145., 5 *M. & R.* 47.

a verdict; but, as the reversionary interest of the plaintiff might be injured, although the house itself was not, and that question had not been submitted to the jury, the court ordered a new trial. [*Maule*, J. That was waste.] In *Shadwell* v. *Hutchinson* (*a*), it was ruled by Lord *Tenterden*, that a reversioner may maintain an action for a nuisance, which produces no injury to his reversion beyond that to the right, and which may be removed before the reversion comes into possession. If the continuance of the sky-light in that case would injuriously affect the plaintiff's right, surely the same result would follow here from the fastening of the gate. [*Cresswell*, J. The putting a lock on the gate, was not *necessarily* an obstruction of the tenant's free passage.] After verdict, it must be assumed that the tenant *was* obstructed. In *Tucker* v. *Newman* (*b*), the building of a roof with eaves, — and, in *Fay* v. *Prentice* (*c*), the erection of a projecting cornice, — whereby the rain was discharged on to adjoining premises, was held to be a nuisance from which the law would infer injury to the reversioner of such adjoining premises. Such an obstruction as this, acquiesced in by the reversioner, would afford an answer to a claim of right of way resting upon twenty years' user. He, therefore, clearly must have a right of action, to vindicate his title. [*Cresswell*, J. Could the reversioner maintain an action, where the gate was locked with the permission of his tenant?] The act of the tenant, in the absence of knowledge by the reversioner, would not be allowed to prejudice him: *Daniel* v. *North*. (*d*) *Bayley*, J., in that

(*a*) *M. & M.* 350., 4 *C. & P.* 333. In that case, a second action was brought, and damages recovered for a *continuance* of the nuisance. *Shadwell* v. *Hutchinson*, 2 *B. & Ad.* 97.

(*b*) 11 *Ad. & E.* 40., 3 *P. & D.* 14.

(*c*) *Antè*, Vol. I. p. 828.

(*d*) 1 *East*, 372.

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case, says: "The tenant cannot bind the inherita this case, either by his own positive act, or b neglect. If, indeed, the landlord had known of windows having been put out, and had acquiesced for twenty years, that would have bound him." *liams*, J. That remark would equally apply to a assenting to a right of way, or to an obstruction right of way.] No doubt it would. [*Williams*, J *Baxter* v. *Taylor* (*a*), it was held that a rever cannot maintain an action on the case against a str for merely entering upon his land held by a tena lease, though the entry be made in the exercise alleged right of way,—such an act, during the ter not being necessarily injurious to the reversion.] ground upon which the decision in that case proc was, that the acts complained of, would not be evi against the reversioner in support of a claim of rig the trespasser. The question now before the is of a totally different character. [*Williams*, J. report of that case in 1 *Nev.* & *Man.* 11., *Parke*, made to say,—"My notion is, that there mu some destruction of the land, to enable the rever to maintain this action. No case has ever gone as to constitute a simple trespass, like this, an inj the reversion." *Maule*, J. My brother *Parke* do say that it would not be evidence, if the party cl a right of way, and meant to assert it.] In *Dob Blackmore* (*b*), there was no permanent injury t reversion; and the jury negatived actual da [*Maule*, J. To entitle the reversioner to maintai action, must not the two things concur, *viz.* an i of such a nature as will be presumed to be perm and the fact of its being evidence against him

(*a*) 4 *B.* & *Ad.* 72., 1 *N.* & *M.* 11.

(*b*) 9 *Q. B.* 991.

claim of right? Will the circumstance of its being evidence against him alone suffice? It is clear that no action by the reversioner can be founded upon an act done, during the continuance of the lease, by the permission of the tenant. (*a*) Here, the declaration avers the obstruction to be of such a nature as to be an injury to the reversion. That is clearly the only way in which it can be sustained.] In no case has the right to maintain the action been put upon the ground that something had been done to the land itself. In *Shadwell* v. *Hutchinson*, Lord *Tenterden* puts it on the ground of loss of evidence of the right. In *Hopwood* v. *Schofield* (*b*), *Patteson*, J., — who was one of the judges who concurred in the decision of *Baxter* v. *Taylor*, — says: "I do not say that a right of way may not be obstructed under such circumstances as would entitle the reversioner to an action on the case: but *Jackson* v. *Pesked* (*c*), and all the authorities, shew that he can only sue for a permanent injury to the object of his reversionary interest. How can that injury be called permanent, which, it is in evidence, can be redressed in a few days? If, indeed, there had been any obstruction operating in denial of the right, it might have been different." Here, the declaration contains both the allegations, one or other of which was held in *Jackson* v. *Pesked* to be necessary to make the declaration good: it avers that the obstruction is of a permanent nature, and that the plaintiff is injured by the consequent diminution in value of his reversionary estate. In *Alston* v. *Scales* (*d*), a surveyor of highways was held liable in case at the suit of a reversioner, for subtraction of a portion of his bank by the road side,

(*a*) *Quære*, where the tenant of a house is passive while a stranger pulls it down.

(*b*) 2 *M. & Rob.* 34.

(*c*) 1 *M. & Selw.* 234.

(*d*) 9 *Bingh.* 3., 2 *M. & Scott*, 5.

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although the occupying tenant, who was called as a witness, stated that the property was improved by what the surveyor had done.

Whateley and *Piggott*, in support of the rule. To entitle the plaintiff to maintain this action, he must shew that his reversion has been injured, and that the injury is of a permanent character. It is not alleged here that the gate was erected by the defendant; but merely, that, being there, he locked it. It is perfectly consistent with that statement, that the defendant locked the gate with the assent of the tenant, and that each had a key. [*Cresswell*, J. There is an averment here that the obstruction was permanent, and an injury to the reversion: it must be assumed that the judge would have told the jury that such a declaration would not be proved by the state of facts you suggest.] The court will intend nothing which is not stated. "Nothing can be supplied beyond that of which proof is necessarily involved in the proof of what is alleged:" *per* Lord *Denman*, in *Davis* v. *Black*. (*a*) The distinction which will be found to pervade all the cases is, whether the obstruction is in its nature permanent or not. [*Williams*, J. What do you mean by permanent?] The erection of a wall, as in *Jesser* v. *Gifford*, would be a permanent obstruction: or the building a house across the way. In *Baxter* v. *Taylor*, *Taunton*, J., said: "The action is by a reversioner against a mere stranger, and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant, and to an action for an injury to the reversion against a stranger. *Jackson* v. *Pesked* shews, that, if a plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must

(*a*) 1 *Q. B.* 900. 911.

state an injury of such a permanent nature as to be necessarily prejudicial thereto." In the same case, *Patteson*, J., says: "To entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. It is said that this action is maintainable, because the plaintiff's title may be prejudiced by a trespass committed under a claim of right: but then, for such an injury, the action must be brought in the name of the tenant, who is the person in the actual possession of the land." (*a*) And *Parke*, J., adds: "To entitle the plaintiff to maintain this action, it was necessary for him to allege, and prove, that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right, is not necessarily injurious to the reversionary estate: and what Lord *Tenterden* said in *Young* v. *Spencer* must be construed with reference to the subject-matter then under consideration, — an action on the case in the nature of waste, by a reversioner against his tenant." The ruling of the same learned judge in *Hopwood* v. *Schofield* was to the same effect. *Dobson* v. *Blackmore* is precisely in point: there, a count stating the plaintiff to be reversioner of premises, occupied by his tenants, and abutting on a public navigable river, and that the plaintiff and all the liege subjects of the Queen were accustomed of right to have free navigation and passage on the river, for boats, &c., and that the plaintiff was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to

(*a*) *Quære*, as to redress for an injury to reversioner's title, being wholly dependant on will of tenant.

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approach the same, and pass to the premises from the river, and unload the boats on the premises, without obstruction, but that the defendant fixed barges, planks, &c., in the part of the river near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises from the river, and hindered the unloading of boats on the premises, and by means thereof the plaintiff was injured in his reversionary interest, — was held bad, in arrest of judgment, as not shewing a damage to the reversionary interest. (*a*) Lord *Denman*, in giving the judgment of the court, there says: "The objection to the six counts, was, that the unlawful act charged does not, *per se*, import any damage to the plaintiff's reversionary interest. The tenant in possession is abridged of his rights by the stoppage of a public road, and may suffer damage from it. But the landlord, who is out of possession, is in nowise damnified by his tenant's being prevented from enjoying his house in so ample a manner as he might otherwise have done. Each of the counts in question would be established by evidence proving that the defendant had, on two different days, placed a bar across the road for five minutes only. In *Baxter* v. *Taylor*, a greater obstruction was held to give a reversioner no cause of action. Even a more permanent nuisance may not continue till the end of the lease, when the plaintiff's right of possession would accrue, but might in the meantime be abated by one of the public, or by the sheriff, on indictment." [*Williams*, J. In the case of *The Provost and Scholars of Queen's College, Oxford*, v. *Hallett* (*b*), it was held that an action on the case for an injury to the inheritance, lies by the reversioner, pending the term, against the tenant, for inclosing and cultivating waste land included

(*a*) And see *Rose* v. *Groves*, 5 *M. & G.* 613., 6 *Scott, N. R.* 645.

(*b*) 14 *East*, 489.

n the demise, and for continuing the grievance. And *Grose*, J., said: "Acts of this kind have been held over and over again to be a present injury to the estate of the reversioner."] There is a marked distinction between the case which Lord *Ellenborough* there puts, of the building of a wall, — *Jesser* v. *Gifford*, — and the present case. So, in *Tucker* v. *Newman*, that which the defendant did, was, in itself, as *Patteson*, J., observes, *something lasting*. That is the distinction which runs through all the cases. [*Maule*, J. You must shew that that which is charged here, could not possibly be an injury to the reversion. It must be taken that the court of Queen's Bench decided, in *Dobson* v. *Blackmore*, that proving the declaration in *any* way would shew no cause of action. The action there was, for obstructing a *public* way. It was necessary, therefore, to shew some *particular* injury. For anything that appears, there could have been no particular injury.] It has been said that the continuance of this gate for twenty years might conclude the plaintiff. That, however, is not so; for, there could be no enjoyment "as of right," as against the reversioner, so long as the land was in the hands of the tenant: *Bright* v. *Walker*. (*a*) *Parke*, B., in delivering the judgment in that case, says: "In order to establish a right of way, and to bring the case within this section (*b*), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for, that is the form in which by section 5. such a claim must be pleaded: and the like evidence would have been required before the statute, to prove a claim by prescription or non-existing *grant*. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in

(*a*) 1 *C. M. & R.* 211. 219. (*b*) 2 & 3 *W.* 4. *c.* 71. *s.* 2.

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the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done, — if he shall have occasionally asked the permission of the occupier of the land, — no title could be acquired, because it was not enjoyed 'as of right.'"

MAULE, J. I think the declaration in this case, — which is objected to after trial and a verdict for the plaintiff, and which alleges that the defendant wrongfully and unjustly locked, chained, and fastened a certain gate in and across a certain way, and wrongfully and injuriously kept and continued the same so locked, chained, and fastened, and so obstructed the way whereby the plaintiff was injured in his reversionary right and interest, — states a cause of action which entitles the plaintiff to damages; and that we cannot arrest the judgment. It may have been that no evidence was given at the trial, of any such obstruction as could be a permanent injury to the plaintiff's reversion. That might have been ground for a nonsuit, or a verdict for the defendant: but it was not so put at the trial. The only question, therefore, for our consideration, is, whether the plaintiff's reversionary interest *might* be injured by the acts alleged in this declaration to have been done by the defendant. It appears to me that it might. It is not denied that the erection of a wall across the way, — assuming, of course, that there was no contract as between the tenant of the land and the defendant, — would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land: and I cannot doubt that there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall. The meaning of the allegation, that, by means of the premises, the plaintiff

was greatly injured in his reversionary estate and interest, is not that the injury follows as a consequence of law from what is previously stated, — like an allegation that *J. S.* was seised in fee, and that he died so seised, whereby *J. T.*, his son and heir-at-law, became entitled: but it is an allegation of a matter of fact, as was lately held in this court, in the case of *Brown* v. *Mallett* (*a*), which is for the jury to find, or not, according to the evidence. I therefore think, upon the whole, that the declaration is sufficient.

CRESSWELL, J. I have entertained a good deal of doubt during the progress of the argument: but I concur in the judgment which has been pronounced by my brother *Maule*. *Jackson* v. *Pesked* decides that a declaration of this sort is insufficient unless it contain an averment that the acts charged injured the plaintiff's reversionary interest. That case, however, impliedly recognises the validity of a declaration which contains such an averment, and states facts which may or may not amount to such injury of the reversion. Here, the declaration alleges certain things to have been done by the defendant, so as to occasion injury to the plaintiff's reversionary interest. I agree with my brother *Maule* that that is an allegation of fact, and that we must take it to have been proved, if the facts stated could so operate. It is impossible to say that a gate *may* not be so fastened as to enure as an injury to the reversion.

WILLIAMS, J. I am of the same opinion. If in point of fact the obstruction complained of took place under such circumstances as not to occasion any permanent injury to the plaintiff's reversion, the judge ought to have directed the jury to find for the defendant. The learned judge, however, did not so direct the jury: and no complaint is made on that score. We must,

(*a*) *Antè*, Vol. V. p. 599.

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therefore assume such a state of facts to have been proved as might exist consistently with what is charged in this declaration as being an injury to the plaintiff's reversion. There is clearly no ground for arresting the judgment.

Rule discharged.

BARNEWALL, One of the Registered Public Officers of THE COMMERCIAL BANK OF LONDON, v. SUTHERLAND, CONNELL, MITCHELL, and DUFF.

Feb. 25.

A., who sued as public officer of a banking company under the statutes 7 *G.* 4. *c.* 46. and 7 & 8 *Vict. c.* 113., died after issue joined. The nisi prius record was made up from the plea-roll, as though *A.* was alive. The *venire* had been awarded accordingly as between *A.* and the defendants, and no entry was made on the plea-roll, of the death of *A.*, or of the appointment of another public officer. After the nisi prius record was so made up, a memorandum was entered upon it, stating the fact of the death of *A.*, and that *B.*, another public officer of the co-partnership, had been appointed to continue the proceedings; but this was not stated by way of suggestion to the court, nor was it followed by any statement of confession by the defendants, or a *nient dedire:* and, after such entry had been made, the cause was entered for trial as "*B* v. (the defendants)," and was tried by the jury returned on the *venire* in the cause of "*A.* v. (the defendants)." Three of the defendants appeared at the trial, under protest; the fourth had suffered judgment by default: and a verdict was found for the plaintiff: —

Held, that the entry so made upon the nisi prius record, was irregular, and did not authorise the trial in the name of *B.* as plaintiff.

Quære, whether a formal suggestion of the death of *A.* would have been traversable?

THIS action was commenced on the 12th of *December*, 1848, in the name of *John Taylor*, one of the registered public officers of the Commercial Bank of *London*. Judgment by default was signed against the defendant *Duff*. The other defendants, *Sutherland*, *Connell*, and *Mitchell*, having pleaded several pleas, issues were joined thereon on the 9th of *July*, 1849, and notice of trial, and of the assessment of damages against *Duff*, was given for the then next *Surrey*

assises. On the 18th of *July, Taylor* died. The commission day of the *Surrey* assises was *Monday*, the 6th of *August*. On the evening of that day, the following notice was served at the office of the defendant's attorney:—

"In the Common Pleas.

"Between *John Taylor*, one of the registered public officers of the Commercial Bank of *London*, and *John William Sutherland, John Connell, John Mitchell*, and *Adam Duff*.

"We do hereby give you notice that the above-named plaintiff, *John Taylor*, has died since the issues were joined in this cause, and that the said action will be continued in the name of *Thomas Barnewall*, another of the registered public officers of the said Commercial Bank of *London*, pursuant to the statute in that case made and provided; and that the said cause will be taken down to trial, and entered accordingly. Dated, &c.

"*Amory* & Co.
"Plaintiff's attorneys."

The defendants' attorney had, before the receipt of the above notice, sent his managing clerk to *Croydon* to watch the entry of the cause, and to attend the trial; and, on receiving the notice, he proceeded to *Croydon*, where he arrived between 12 and 1 o'clock on the 7th of *August*, when he was informed by his clerk that the cause had been entered for trial in the name of *Thomas Barnewall*, and that a suggestion to the following effect had been entered on the nisi prius record:—

Suggestion.

"Before which last-mentioned day, and after the said 10th of *July*, to wit, on the 18th of *July*, 1849, the said *John Taylor* departed this life, being until and at the time of his death such registered public officer

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as aforesaid; whereupon, according to the first-mentioned act of parliament (*a*), as the same hath been extended by the act of parliament secondly above mentioned (*b*), as in the declaration in this cause mentioned, one *Thomas Barnewall*, then being, and thenceforth hitherto and still being, one of the registered public officers of the said Commercial Bank of *London* was and is duly appointed in the room and place of the said *John Taylor*, deceased, further to continue, prosecute, and carry on the said action; and thereupon and thereby, and according to the law in that behalf, the said suit so commenced by the said *John Taylor* as aforesaid is further continued, prosecuted, and carried on by the said *Thomas Barnewall* for and on behalf of the said co-partnership. Therefore," &c.

The defendants' attorney, having obtained a copy of this suggestion, caused the same to be laid before the counsel retained on the part of the defendants *Sutherland, Connell,* and *Mitchell,* to advise them as to pleading thereto. Counsel advised that the suggestion should be pleaded to; but, inasmuch as the eight days allowed, by the practice of the court, to the defendants to plead, would expire after the 10th of *August*, they recommended the defendants to appear at the trial under protest, and to apply to have the trial postponed, in order that the defendants might have the opportunity of pleading to the said suggestion.

The cause came on for trial before *Pollock*, C. J., and a common jury summoned in a cause wherein the said *John Taylor* was the plaintiff, and the above-named *Sutherland, Connell, Mitchell,* and *Duff* were defendants, on the 18th of *August*, 1849.

Before the jury were sworn, the defendants *Sutherland, Connell,* and *Mitchell,* by their counsel, appeared

(*a*) 7 *G.* 4. *c.* 46. (*b*) 7 & 8 *Vict. c.* 113.

and objected to the trial of the cause, by reason of the abatement in consequence of the death of *Taylor*, and that the defendants had no opportunity of pleading to the suggestion so entered on the nisi prius record as aforesaid; and also that the jury summoned to try the cause had no authority to try a cause wherein *Thomas Barnewall* was the plaintiff. After hearing counsel on the part of the plaintiff, in reply to the said objections, the lord chief baron said that the better course would be to try the cause, and for the defendants to appear under protest; and he ordered the jury to be sworn; and the jury were sworn accordingly; and a verdict was found for the plaintiff, subject to an application to the court.

Upon an affidavit of the above facts, and also stating, that, according to the practice of this court, jury-process could not be issued until a few days before the commission-day, and that the deponent believed that the jury-process in this cause was issued after the death of *Taylor*,

Russell Gurney, in *Michaelmas* term last, moved to enter a verdict for the defendants, or for a new trial. The defendants were clearly entitled to an opportunity of traversing the suggestion: it might be a matter of importance to them in respect of costs. In *Brocas v. The City of London* (*a*), it is said by the court,—"It was settled in Sir *Peter Delme*'s case, and has always been the course of the court, that, when either party will suggest any special matter about awarding the *venire* out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a *nient dedire*." Here, the whole proceeding would be a nullity

(*a*) 1 *Stra.* 235.

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without a suggestion; and an indictment for perjury could not be sustained for any false evidence given on the trial: *The King* v. *Cohen.* (*a*) In *Bartlett* v. *Pentland* (*b*), it is laid down as a general rule, that, wherever by the provision of an act of parliament, a person not a party to the record, is to be affected by a judgment, or where the judgment is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is, to enter a suggestion on the roll; so that the party to be affected may demur if the plaintiff do not set forth facts to bring the case within the act of parliament, or that he may traverse those facts if untrue. The case of *Watson* v. *Quilter* (*c*) clearly establishes that such a suggestion may be traversed; notwithstanding the doubt suggested by *Maule*, J., in *Bartholomew* v. *Carter* (*d*), where that learned judge observes that "no instance can be found in the whole history of the law, of a suggestion being traversed. [*Maule*, J. It certainly is somewhat singular that no instance of a trial of a traverse of a suggestion is to be met with, although it has so repeatedly been said that it is traversable.]

The 9th section of the 7 *G.* 4. *c.* 47., the act for the regulation of banking co-partnerships, enacts that all actions and suits, &c., and all other proceedings at law or in equity, to be commenced or instituted for or on behalf of any such co-partnership against any person or persons, shall be commenced, instituted, and prosecuted in the name of one of the public officers for the time being of such co-partnership as the nominal plaintiff for and on behalf of the co-partnership; and that the death, resignation, removal, or any act of such

(*a*) 1 *Stark. N. P. C.* 511.
(*b*) 1 *B. & Ad.* 704.
(*c*) 1 *M. & W.* 760., 1 *D. & L.* 244.
(*d*) 5 *Scott, N. R.* 501.; *S. C.* 4 *M. & G.* 612.

public officer, shall not abate or prejudice any such action, suit, or other proceeding commenced against or by and on behalf of such co-partnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such co-partnership for the time being. By a subsequent act, 7 & 8 *Vict. c.* 113. *s.* 1., it is provided that no joint-stock bank established after the 6th of *May*, 1844, shall carry on business, unless by letters-patent under that act. And the 47th section enacts, "that, after the passing of this act, every company of more than six persons established on the said 6th of *May*, for the purpose of carrying on the said trade or business of bankers within the distance of sixty-five miles from *London*, and not within the provisions of this act, shall have the same powers and privileges of suing and being sued in the name of any one of the public officers of such co-partnership as the nominal plaintiff, petitioner, or defendant, on behalf of such co-partnership." There is no provision in that section that actions shall not abate by the death of the public officer. [*Maule*, J. They would not have *all* the power of suing, unless they could carry on the proceeding in the name of a surviving public officer. The two acts are to be construed as being *in pari materiâ.*]

The declaration states that the plaintiff sues as public officer according to the 7 *G.* 4. *c.* 46., as extended by the 7 & 8 *Vict. c.* 113.; and that is traversed. The question is, whether the plaintiff is not suing under the latter act only: and, if he is, the declaration is bad, for not shewing that the co-partnership was an existing co-partnership on the day named in the act, the 6th of *May*, 1844. The former act applies only to companies carrying on the business of bankers more than sixty-five miles from *London*. [*Maule*, J. Can there be a

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doubt that the company are suing under the latter act? There is nothing in that point.]

A rule nisi having been granted upon the first point,

Channell, Serjt., and *Peacock*, in the last term, shewed cause. Assuming that the last day for pleading was the 10th of *August*, the defendants had still three days during which they might have traversed the suggestion if traversable. But the defendants are under a mistaken impression with respect to the 2 *W.* 4. *c.* 39. *s.* 11., which only applies to pleadings before issue joined,—otherwise pleas *puis darrein continuance* would be precluded: the defendants, therefore, had ample time before the day of trial, to tender a traverse.

But it is submitted that the fact here suggested was not traversable at all. It was not necessary to suggest *Taylor*'s death until the judgment-roll was made up: *Tidd*'s Practice, 9th edit., p. 1119.; *Denn* d. *Lawson* v. *Farr.* (*a*) There, "after issue joined, and before the day of nisi prius, one of the defendants died: the plaintiff sued out a *venire facias* between himself and the surviving defendant, and made the *jurata* at the foot of the record of nisi prius, agreeable thereto. Verdict for plaintiff. Objected at the trial, that the death of the deceased defendant ought to have been suggested on the nisi prius record, and thereupon an award of a *venire facias* between the plaintiff and the surviving defendant. Point reserved was now argued; and thereupon the plaintiff produced the roll in court, whereon the suggestion and award of the *venire facias*, as above, were entered; which the court held to be sufficient." The question arose in *Webb* v. *Taylor* (*b*), where a defendant gave a *cognovit actionem* in a suit by a public officer

(*a*) *Barnes*, 469.; *Farr* v. *Denn*, 1 *Burr.* 363.

(*b*) 1 *D.* & *L.* 676.

under the 7 *G.* 4. *c.* 46., and, before judgment was entered, the nominal plaintiff was removed from his office, but the name of the plaintiff on the record was not altered, and judgment was signed in the name of such plaintiff, and the defendant having been arrested on a *ca. sa.* issued upon the judgment, the court allowed the record and writ to be amended, upon the application of the banking company, who were the real plaintiffs, by the insertion of the name of the new public officer, *nunc pro tunc*, and refused to set aside the judgment on the ground of the irregularity. It never was intended that a matter of mere form like this should be traversed. It is very different from the matters suggested in *Bartlett* v. *Pentland* and the cases which followed it, and *Watson* v. *Quilter:* those were matters of substance. [*Maule*, J. You cannot introduce new parties upon the record without a suggestion.] That may be; but there is no case to shew that the fact need be suggested upon the nisi prius record. Suppose a suggestion were entered, that the plaintiff had been created a baronet after the commencement of the action, would that have been traversable?

Gurney and *Ogle*, in support of the rule. The jury were summoned to try a cause of *Taylor* v. *Sutherland*, and the cause tried was *Barnewall* v. *Sutherland*. This was a clear irregularity, and one by which the defendants might be prejudiced in respect of costs. There are numerous cases to shew, that, wherever it becomes necessary to shew upon the record an excuse for deviating from the customary course of proceedings, it must be done by some act of the court, or by a suggestion, which the other side must have an opportunity of traversing or demurring to. In *Pennoir* v. *Brace* (*a*),

(*a*) 1 *Salk.* 312. 319., 1 *Lord Raym.* 244.

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judgment was obtained in trespass against four, who brought error, and afterwards one of them died: it was held that the plaintiff could not sue out execution without suggesting the death upon the record. [*Williams*, J. There, the writ did not agree with the judgment. In *Rex* v. *Cohen* (*a*), it was held, that, if a co-plaintiff die, the suit will be abated, unless the death be suggested according to the statute 8 & 9 *W.* 3. *c.* 11. *s.* 6.: and therefore, if a co-plaintiff die after issue joined, a trial without such suggestion on the record would be extra-judicial, and consequently no perjury could be assigned upon any false evidence given thereon. [*Maule*, J., referred to the form of suggestion given in *Chitty*'s Statutes, p. 2., n. (*e*).] In such a case as this, the jury could not be attainted, or fined for non-attendance. [*Wilde*, C. J. The *venire* should certainly follow the record.] In *Plomer* v. *Ross* (*b*), *Heath*, J., says that a suggestion may be pleaded to, and that common justice requires it. [*Williams*, J. That was a suggestion of breaches.] All the authorities are fully considered in *Watson* v. *Quilter*, where the question is very elaborately discussed by Lord *Abinger*; and the result is, that a suggestion of this kind must be so entered as to give the opposite party an opportunity of traversing or demurring to it. [*Williams*, J. What do you say that the company should have done here?] They should have served the defendants with the suggestion, and demanded a plea. [*Williams*, J. Suppose the death of *Taylor* had taken place on the day before the trial, — what would have been their course then?] That might occasion inconvenience: but it is enough to say it is not this case. Here was a fourth defendant, *Duff*, who was not represented at the trial, he having

(*a*) 1 *Stark. N. P. C.* 511. (*b*) 5 *Taunt.* 381—391.

suffered judgment by default before *Taylor*'s death: suppose execution were to issue against him upon this assessment of damages at the suit of *Barnewall*, — would he not be justified in resisting and even shooting the officer? [*Cresswell*, J. I think he would be very rash. He would probably have the wisdom to take advice.]

Cur. adv. vult.

WILDE, C. J., now delivered the judgment of the court.

In this case a rule has been obtained, on the part of the defendant, to shew cause why the verdict which has been found for the plaintiff, should not be set aside, and a new trial had.

The facts were, that the plaintiff, who sued as public officer of a banking company, under the statute 7 *G.* 4. *c.* 46., died after issue joined, and that the nisi prius record was made up from the plea-roll, as though the party were alive; that the *venire* had been awarded accordingly as between *Taylor* as plaintiff and the defendants; and that no entry was made upon the plea-roll, of the death, or of the appointment of the new public officer.

It appears, further, that, after the nisi prius record was passed so made up, a memorandum was entered upon it, stating the fact of the death, and that *Barnewall* had been appointed public officer, — but which was not stated by way of suggestion to the court, nor followed by any statement of a confession by the defendant, or a '*nient dedire*;' and that, after such entry had been made, the cause was entered for trial as a cause of *Barnewall* v. *Sutherland*; and that cause was tried by the jury returned upon the *venire* in a cause at the suit of *Taylor*.

Upon the part of the plaintiff, notice had been given

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of the death of *Taylor*, and that such an entry would be made, and that the cause would be tried. Some of the defendants appeared to protest against the trial, and others did not appear.

A verdict was found for the plaintiff, and the present rule was afterwards obtained to set aside that verdict, on the ground that the entry made upon the record, of the death of *Taylor*, and that *Barnewall* had been appointed public officer, was irregular; as was also the proceeding to trial in a cause in which *Barnewall* was the plaintiff, by a jury returned under a *venire* in a cause in which *Taylor* was the plaintiff.

Upon shewing cause against this rule, the plaintiff insisted that his proceedings had been regular, being authorised by the statute of 7 *G.* 4. *c.* 46. By the 9th section of that statute, the companies mentioned therein, are authorised to sue in the name of a public officer; and it is enacted "that the death, resignation, or removal, or any act of such public officer, shall not abate or prejudice any such action, but the same may be continued and carried on in the name of any other public officer of the co-partnership for the time being." And in section 12. it is enacted "that any judgment recovered against any public officer of the co-partnership shall have the like effect and operation against the property of the partnership, and the property of every member thereof, as if such judgment had been recovered or obtained against the co-partnership."

The plaintiff contends, that, under these words, suggestion, or entry upon the plea-roll, was necessa and that a mere memorandum upon the nisi p record, stating the fact of the death of *Taylor*, and *Barnewall* had been appointed public officer, w that was required; and also that the cause was pr tried in the name of such new public officer as p and that no new *venire* was requisite.

Upon the part of the defendant, it was contended that the enactment that the action shall not abate by the death of the public officer, the plaintiff, — as would have been the case by the course of the common law, — and that the action may be carried on in the name of the new public officer, does not dispense with the necessity of the fact of the death, and the appointment of the new public officer, being suggested upon the record, nor the issuing of a *venire* in the name of the new or substituted plaintiff. And the defendants insist, — except where there is an express statutable provision dispensing with it, — that, in all cases where there is a change of parties during the progress of the cause, before trial, that change is required to appear upon the record, by way of suggestion to the court; and, where such facts are not traversable, they should be followed by a confession, or *nient dedire.*

In this case, the defendants had traversed by plea the appointment of *Taylor* as a public officer of the company; and a verdict for the defendants upon the issue on that plea would have been a full defence: and for a good reason; for, the company would not be bound by the judgment in the cause, unless the plaintiff *Taylor* was a public officer of the company; nor would the property of the members of the company have been bound by any such judgment. And the fact whether *Barnewall* was a public officer of the company when he was substituted as plaintiff, is equally important to the defendant as was the character of *Taylor* when *he* stood upon the record as plaintiff. And, if the court, upon application, would have allowed a suggestion that *Barnewall* was a public officer, to have been entered, with a confession or a *nient dedire,* some satisfactory evidence must have been offered to the court of the fact. But, in this case, the memorandum was entered upon the record, stating the fact, without any authority

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from the court; and in a very informal manner, without any opportunity to the defendants to traverse the facts stated, and without the statement of any matter excluding the right to do so, such as follows a suggestion which the opposite party is not allowed to traverse.

Without entering into the question, whether, if the suggestion were properly entered upon the plea-roll the facts alleged would be traversable or not, it is clear that the entry which was made on the nisi prius record in this case was irregular, and did not authorise the trial of the cause in the name of *Barnewall* as the substituted plaintiff; and therefore the rule for setting aside the verdict which has been obtained for the plaintiff, and for a new trial, must be made absolute.

Rule absolute.

BARNES, Administrator of JANE BARNES, deceased, *v.* WARD.

Feb. 25.

A. being possessed of land abutting on a public footway, in the course of building a house on such land, excavated an area, which, by the negligence of his workpeople, was left unfenced, so that *B.*, who was lawfully passing along the way, the night being dark, without any negligence or default of her own, fell into the area, and was killed: — Held, that *A.* was liable, under the 9 & 10 *Vict. c.* 93., to an action by the husband, as administrator, for the benefit of himself and *B.*'s infant children.

THIS was an action upon the case brought by the plaintiff as administrator of *Jane Barnes*, deceased, under Lord *Campbell*'s act, 9 & 10 *Vict. c.* 93,

The declaration alleged that the defendant was possessed of a messuage, with the appurtenances, near to a common and public footway, and that, in front of and before the said messuage, and parcel of the appurtenances thereof, and close to, and by the side of, the said footway, and abutting upon, and opening into, the same, there then was a large hole, vault, or area, which hole, vault, or area, the defendant, by reason of the possession of the said messuage, *with the appurte-*

intituled "An Act for compensating the families of persons killed by accident," to recover damages from the defendant, the owner of land adjoining a public footway, for negligence in leaving unfenced an excavation on his land, and thereby causing the death of the intestate.

The declaration alleged that the defendant, before and at the time, &c., was possessed of a messuage, with the appurtenances, near to *a common and public footway*, in front of and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said footway, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which said hole, vault, pit, or area, the defendant, by reason of the possession of the said messuage [with the appurtenances (*a*)], before and at the said time when &c., ought to have so sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in and along the said footway: yet that the defendant, whilst he was so possessed of the said messuage, and the said hole, vault, pit, or area, and premises, with the appurtenances, and whilst there was such hole, vault, pit, or area, on &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, vault, pit, or area to be and continue, and the same was then, so wholly unguarded, and not fenced off or railed in, that, by

(*a*) These words were added on amendment at nisi prius.

nances, before and at the time when &c., ought to have so sufficiently guarded and fenced as to prevent injury to persons lawfully passing in and along the said footway:— Held, that the duty of the defendant to fence the area, was properly alleged:

Held also, that the judge at the trial was justified in amending the declaration, by adding the words in *italics*.

In such a case, the declaration need not negative the existence of any relations entitled to compensation, other than those on whose behalf the action purports to be brought.

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means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same the said *Jane Barnes*, who was lawfully passing in an upon the said footway, slipped and fell into the sai hole, vault, pit, or area, and was thereby killed: T the damage, &c.: And thereupon the plaintiff, as suc administrator as aforesaid, for the benefit of himself, t husband of the said *Jane Barnes*, and of *Jane Bar* her infant daughter, of the age of ten years, and *Elizabeth Barnes*, her infant daughter, of the age o eight years, and of *Robert Barnes*, her infant son, of the age of six years, according to the form of the statute in such case made and provided, brought his suit &c. — Profert of letters of administration.

The defendant pleaded,—first, not guilty,—secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c., — thirdly, that he ought not, by reason of his possession of the said messuage, with the appurtenances, to have guarded, fenced off, and railed in the said hole, vault, pit, or area, in manner and form, &c.

On these pleas, the plaintiff joined issue.

The cause was tried before *Coltman*, J., at the sittings at *Westminster* after *Easter* term, 1847. The facts were as follows: —The deceased, *Jane Barnes*, between eight and nine o'clock in the evening of the 26th of *October*, was proceeding, in company with her sister and a child, along an unfinished pathway near a row of houses then in the course of erection by the defendant, a builder, called *Victoria Grove Terrace*, in the *Uxbridge Road*. It being dark, and no light near, the deceased accidentally fell down the area in front of one of the houses, and died shortly afterwards, from the injuries she thus sustained. It appeared that the deceased was sober at the time of the accident, and that there was no fence to guard the area, but merely a low stone coping

ception of iron railings. It further appeared re had always been a thoroughfare; but the as to the particular part of the newly formed ch had constituted the antient pathway, was t confused. The land belonged to the Bishop m, by whom it had been leased for terms of various persons, under one of whom the de- held the premises in question.

e part of the defendant, it was contended,— there was no sufficient evidence that the foot- a public way, — secondly, that a man has a excavate his own land to its extremity, and no common law obligation upon him to fence or ich excavation, even though it abut upon a , — thirdly, that the third issue was not, in its stained by the evidence.

earned judge told the jury, that, if there was a ay abutting on the area, and it would be dan- persons passing, unless fenced, — or, if there blic way so near that it would produce danger blic, unless fenced, — the defendant would be less the accident was occasioned by want of caution on the part of the deceased.

jury found that there was an immemorial ay abutting on the area; and they returned a or the plaintiff, damages 300*l.*, — being, 100*l.* husband of the deceased, 75*l.* each to her two ughters, and 50*l.* to her son.

Serjt., in *Trinity* term, 1847, pursuant to served to him at the trial, moved for a rule to se why this verdict should not be set aside, and t entered for the defendant; or why there ot be a new trial, on the ground of misdirec- l that the verdict was against evidence; or why ment should not be arrested.

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No such duty is cast by the common law upon the owner of land adjoining a public way, under the circumstances disclosed, as is sought to be enforced by this action. The various provisions of the local acts for the districts surrounding *London*, and also the 70th section of the general highway act, 5 & 6 *W.* 4. *c.* 50. (*a*), shew that the interference of the legislature was necessary for the protection of the public in these cases. In *Trower* v. *Chadwick* (*b*), it was held that the mere circumstance of juxta-position, does not render it necessary for a person who pulls down his wall, to give notice of his intention to the owner of an adjoining wall: nor, if he be ignorant of the existence of the adjoining wall, — as, where it is under ground, — is he bound to use extraordinary caution in pulling down his own. [*Maule*, J., referred to *Jarvis* v. *Dean*. (*c*) There, in an action on the case

(*a*) Which enacts, "that, from and after the commencement of this act, it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards, nor any windmill within fifty yards, from any part of any carriage-way or cart-way, unless such pit or shaft, or steam-engine, gin, or other like engine, or machinery, shall be within some house or other building, or behind some wall or fence sufficient to conceal or screen the same from the said carriage-way, or cart-way, so that the same may not be dangerous to passengers, horses, or cattle; nor shall it be lawful for any person to make, or cause to be made, any fire for calcining or burning of ironstone, limestone, bricks, or clay, or the making of cokes, within the distance of fifteen yards from any part of the said carriage-way or cart-way, unless the same shall be within some house or other building, or behind some wall or fence, sufficient to screen the same from the same carriage-way or cart-way as aforesaid; and, in case any person shall offend in any of the cases aforesaid, every such person so offending shall forfeit and pay any sum not exceeding 5*l.* for each and every day such pit, shaft, windmill, steam-engine, gin, machine, or fire, shall be permitted to continue, contrary to the provisions of this act."

(*b*) 6 *N. C.* 1., 8 *Scott*, 1.

(*c*) 11 *J. B. Moore*, 354., 3 *Bingh.* 447.

for an injury resulting to the plaintiff from falling down an unprotected area, the declaration stated that the defendant was *possessed* of the premises, and that they were adjoining "a certain common and public street and highway." It appeared that the defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and that workmen employed by him were then actually at work upon them: but it did not appear that any conveyance had been made to him. The street in question, which had been forming for six years, and led from a public street to a new road across fields, over which the way had been publicly used for five or six years, was unfinished, one half only being lighted, the other neither lighted nor paved: but the inhabitants had paid the highway and paving rates. And it was held that this was sufficient evidence to go to a jury, of a possession in the defendant, and of a dedication of the street to the public.]

9 & 10 *Vict.* c. 93.

The statute gives this remedy only if the circumstances are such as would have enabled the deceased person to bring an action, in case death had not ensued. The 1st section recites that "no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him:" and it then enacts, "that, whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would if death had not ensued) have entitled the party injured maintain an action, and recover damages, in respect reof, then, and in every such case, the person who uld have been liable if death had not ensued, shall be le to an action for damages, notwithstanding the

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death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The declaration should have alleged, that, if death had not ensued, the deceased would have been entitled to damages, or it should have stated circumstances whence the court might have seen that that was so. For any thing that appears, although the defendant may have been guilty of a breach of duty, which may have rendered him liable to a penalty, no action could have been brought by the deceased or her husband. [*Maule*, J. A neglect of a public duty, from which a private injury results, gives a good cause of action. This is in truth the same point as the first.]

This action is brought for the benefit of the husband and the three children of the deceased. The 2nd section of the act enacts "that every such action shall be for the benefit of the wife, husband, *parent*, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury, by their verdict, shall find and direct." The declaration should have negatived the existence of any *parent*, or other relative of the deceased, than those named. [*Maule*, J. Did it appear that there was any other person entitled?] No. [*Maule*, J. Then, I do not see how the defendant can be injured by the supposed omission (*a*).]

(*a*) The 3rd section of the act provides "that not more than one action shall lie for and in respect of the same subject-matter of complaint."

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There was no evidence to go to the jury of the extence of a public footway abutting upon the area in uestion. This was a new road. There was no evi-ence of its dedication to the public. There could be dedication by the termors: *Bright* v. *Walker.* (*a*) nd it may be doubtful whether the Bishop of *London,* ho was a mere tenant for life, could dedicate a way to e public. [*Coltman,* J. The bishop was tenant in e, and not for life.]

Amendment.

The duty is alleged to have arisen "by reason of the ossession of the said *messuage,*" not by reason of the ossession of the *area.* Upon this objection being taken t the trial, the learned judge allowed the declaration to e amended, by the addition of the words "with the ppurtenances," — subject to an application to the ourt. [*Maule,* J. Is not that rather an allegation of act, that there were such circumstances attending the efendant's possession of the premises, as to render it his luty to guard the area? Does not "messuage" comrehend the area?] Not in this declaration, which lescribes the area as being "parcel of the appurtenances of the messuage." The amendment entirely changes the duty.

If this verdict stands, a difficulty will arise as to the appropriation of that portion of the money which is awarded to the children.

WILDE, C. J. We all think the amendment was properly allowed. The 3 & 4 *W.* 4. *c.* 42. *s.* 23. provides for the case of an amendment that may prejudice the opposite party in his defence, by allowing him to ask for a postponement of the trial. None was asked for here. And, in truth, the question tried seems to be the very question the parties came prepared to try. As to defendant's duty to fence the area, and also as to the

(*a*) 1 *C. M. & R.* 211. 4 *Tyrwh.* 509.

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evidence of the existence of the footway, we think the rule may go. With regard to the distribution of the damages, we think we have no authority to interfere. The statute seems to have been somewhat imperfectly framed in that respect: but the shares of the children will of course be subject to equities, which may be enforced in the proper place.

Montagu Chambers and *Hugh Hill* shewed cause. (*a*) It is the duty of every man who makes an excavation on his own land, near to a public way, so to fence and guard it as to prevent injury to persons passing in the exercise of a public right. One of the earliest authorities upon this subject, is, *Blithe* v. *Topham* (*b*), which will probably be relied on by the other side. It is there said, that, if *A.*, being seised of a waste adjoining a highway, digs a pit in the waste, within thirty-six feet of the way, and the mare of *B.* escapes into the waste, and falls into the pit, and is killed, yet *B.* shall not have an action against *A.;* because the making of the pit in the waste, and not in the highway, was no wrong to *B.*, but it was by the default of *B.* himself that his mare escaped into the waste. There, as is observed by *Gibbs*, C. J., in *Deane* v. *Clayton* (*c*), "the defendant was held not to be answerable for the damage done to the plaintiff's mare, because the mare had no right to be on the land where the pit, into which she fell, was dug:" and it is to be observed also that the pit was at the distance of thirty-six feet from the highway. "The difference," as is said by *Dallas*, J., in the same case (*d*), "is, between absolute and relative rights,

(*a*) On the 11th of *November*, 1848, the judges present being, *Coltman*, J., *Maule*, J., and *Williams*, J.; *Wilde*, C. J., being absent on account of indisposition.

(*b*) 1 *Roll. Abr. Actions sur Case* (N.) (translated, 1 *Vin. Abr.* 554, pl. 4); *S. C. Cro. Jac.* 158.

(*c*) 7 *Taunt.* 532.

(*d*) *Dean* v. *Clayton*, *Taunt.* 522.

etween that which is mine, exclusive of any right in thers, present and future, and that which is of a preading, shifting possession, as, air, water, &c., in hich I have but a qualified possession, a possession ubservient to the future use by others. If I place a og across a public path, and injury be thereby susained, the soil being my own, but the public, or indiiduals, having a right over it, an action will lie, ecause there is a right in others to pass along without nterruption: but, if there be no right of way, I may, vith any view, and for any purpose, place logs on my own land, and a party having no right to be there, and ustaining damage by his own trespass, cannot bring n action for the damage so sustained." In *Coupland* v. *Hardingham* (*a*), which was an action upon the case for negligence in not railing in or guarding an area before the defendant's house in *Wood Street, Westminster*, whereby the plaintiff fell down into the area, and was severely hurt, — it appeared, that, before the defendant's house, there was an area which was descended to by three steps from the street, and from which there was a door leading into the basement story of the house; that there was no railing or fence to guard the area from the street; and that the plaintiff, passing by on a dark night, fell into it, and broke his arm. The defence set up was, that the premises had been in exactly the same situation as far back as could be remembered, and many years before the defendant was in possession of them. But Lord *Ellenborough* held, that, however long the premises might have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed; and that he was liable for

(*a*) 3 *Campb.* 398.

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the consequence of having neglected to do so, in the same manner as if he himself had originated the nuisance. And his lordship added, — "The area belongs to the house; and it is a duty which the law casts upon the occupier of the house, to render it secure." *Jarvis* v. *Dean* (*a*) is also a distinct authority to the same effect. In *Sarch* v. *Blackburn* (*b*), which was an action for an injury sustained by the plaintiff from the bite of a dog placed in the defendant's yard for the protection of his premises, *Tindal*, C. J., in leaving the case to the jury, said: "If a man puts a dog in a garden, walled all round, and a wrong-doer goes into that garden, and is bitten, he cannot complain in a court of justice of that which was brought upon him by his own act. The difficulty is in saying whether, in the particular place, the means adopted by the defendant were sufficient. We must see, first, whether the plaintiff had a justifiable and reasonable cause for being on the spot; whether he was there without any notice, having such cause as would justify him if he had an action brought against him as a trespasser, for being on the defendant's premises. It seems that there are three different entrances to the premises; one of them more public than the rest, having a spring gate; another, called the middle entrance, across a field; the third, an entrance across the cow-yard, and through a private gate, and another yard, to the house. The plaintiff must have gone through one of the last two. Undoubtedly a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose, may be injured by it. I think he has no right

(*a*) 11 *J. B. Moore*, 354., 3 *Bingh.* 447.

(*b*) 4 *Car. & P.* 297., *M. & M.* 505.

a place a dog so near to the door of his house, that any person coming to ask for money, or on other business, might be bitten. And so with respect to a footpath, though it be a private one; a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it. As to the notice (*a*), it does not appear to me that a painted notice is sufficient, unless the party is in such a situation in life as to be able to avail himself of it. It does not appear to me that this notice is sufficient, so as to bar the action, if the plaintiff had any right at all to be on the spot; for, it seems that he was not able to read. Then, was there any thing in the appearance of the dog which would lead the plaintiff to suppose that the dog would bite him? It seems that the injury happened in the middle of the day, in the month of *July;* and that the plaintiff was a person employed as a watchman in the neighbourhood: and, as no suspicion has been thrown upon him by the other side, you may presume that he was going to the house for a lawful purpose. The only way in which I can leave the question (which I admit is one of considerable nicety) for your consideration, is, to leave it to you to say on which side was the negligence upon this occasion. If there was negligence on the part of the plaintiff, he cannot recover for an injury which he has in part brought upon himself: but, if there was no negligence on his part, and there *was* negligence on the part of the defendant, then the plaintiff will be entitled to your verdict." The jury found for the plaintiff. The defendant afterwards obtained a rule nisi for a new trial; but the matter was ultimately

(*a*) A board, on which was painted in letters three inches in length, — "Beware of the dog."

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compromised. In *Brock* v. *Copeland* (*a*), the defendant, a carpenter, kept a dog for the protection of his yard: the dog was kept tied up all day, and was at that time quiet and gentle, but was let loose at night: the plaintiff, who was foreman to the defendant, had gone into the yard after it had been shut up for the night, and the dog let out, and was severely bitten by him. Lord *Kenyon*, upon this evidence, ruled that the action would not lie. He said "that every man had a right to keep a dog for the protection of his yard or house; that the injury which this action was calculated to redress, was, where an animal, known to be mischievous, was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that here the dog had been properly let loose; and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up." And his lordship added, "that in a former case, where, in an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury, the defendant's counsel contended, that, the plaintiff having gone there of his own head, and having received the injury from his own fault, that an action would not lie: but that, it appearing also in evidence that there was a contest concerning a right of way over this field wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way that he had ruled in that case, and the court of King's Bench had concurred in opinion with him, that, the plaintiff having gone into the field, supposing that

(*a*) 1 *Esp. N. P. C.* 203.

had a right to go there, and the defendant having permitted persons to go there, as over a legal way, that he should not then be allowed to set up in his defence the right of keeping such an animal there as in his own close; but that the action was maintainable." In *Townsend* v. *Wathen* (*a*), it was held to be actionable, to bait traps on a man's own premises, so that his neighbour's dogs were lured to them and injured. [*Cresswell*, J. There was no bait, no temptation, held out here; therefore that case has no application.] The case of *Dixon* v. *Bell* (*b*) places the duty, in cases of this sort, in a very strong light. It was there held, that the law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care: therefore, where the defendant, being possessed of a loaded gun, sent a young girl (of the age of thirteen or fourteen) to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off, — it was held that the defendant was liable. Wherever a neighbour has acquired a right of easement, the owner of the adjoining property cannot so use his land as in any way to prejudice or affect that right: *Cooper* v. *Barber* (*c*): and that applies as well to public rights as to private easements.

The declaration is perfectly good in point of form, — and would have been so, even if the action had been brought by *Jane Barnes* herself. The duty is well alleged, as also the breach. In *Firmstone* v. *Wheeley* (*d*), the declaration stated that the plaintiffs and defendants

(*a*) 9 *East*, 277.
(*b*) 5 *M. & Selw.* 198.
(*c*) 3 *Taunt.* 99.
(*d*) 2 *D. & L.* 203. See *Smith* v. *Kenrick*, *antè*, Vol. VII. p. 515.

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were owners of adjacent mines; that the defendants had trespassed on the plaintiffs' mine, and had carried away a quantity of coal; that water had arisen in the defendants' mine, against which, but for the trespass of the defendants, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine from flowing into the plaintiffs' mine; yet that the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine, and prevented them from working the same: and it was held, on general demurrer, that this was a good count in case.

Byles, Serjt., and *Ogle*, in support of the rule. Three propositions will be sought to be established in this case, on the part of the defendant, — first, that there is no common law duty upon an owner of land adjoining a highway, to guard or fence a ditch or area upon his own land, — secondly, that, if there be any such common law duty, it is not properly alleged in this declaration, — thirdly, that the learned judge who tried the cause ought to have told the jury that there was no evidence that the place in question was a public way.

1. There are many instances of roads passing along the sides of ditches or excavations; but it has never been suggested that the owner of the land on which the ditch or excavation is situate, was bound to fence it; nor is there any instance to be found of an indictment for not doing so. In *Rex* v. *Whitney* (*a*), it was sought to impose such a liability upon the parish; but without success. The language of the 5 & 6 *W.* 4. *c.* 70. *s.* 50. shews that the interposition of the legislature was found necessary, to prevent inconveniences of that sort. The *onus* of shewing the liability to fence, rests upon the

(*a*) 7 *C.* & *P* . 208.

laintiff: and no authority has been cited that bears ery much in his favour. The cases which approach he nearest to this, are, *Coupland* v. *Hardingham* and *'arvis* v. *Dean:* but, in both, the area was constructed t or *under* the public way, — which materially disinguishes those cases from the present. *Blyth* v. *Topam* is an authority for the defendant. [*Williams*, J., eferred to *Sybray* v. *White.* (*a*)] There, the mine into he shaft of which the plaintiff's horse fell, was in the ossession of the defendant, — the plaintiff being posessed of the surface. In *Jordin* v. *Crump* (*b*), a declaation in case alleged that the defendant wrongfully and nlawfully set and concealed a dog-spear, the same eing an engine calculated to do grievous bodily harm, s well to the liege subjects of the Queen, as to their logs happening to run upon the same, among the bushes near a public footway running through a close of the defendant's; and that, by means thereof, a dog of the plaintiff's, with which he was going on foot along the said footway, and which, by reason of a rabbit having crossed the footway in his view, had then, against the will of and unavoidably by the plaintiff, begun to pursue, and was in pursuit of, the said rabbit, ran upon the dog-spear, and was wounded, &c. The defendant pleaded, that the defendant set and concealed the said engine for the purpose of preserving his game, and of disabling and killing dogs that might come upon his close, lest they should pursue and destroy the game, *whereof the plaintiff had notice.* And it was held, on general demurrer, that the plea was a good answer to the action; and that it would have been so even without the allegation of notice. *Alderson*, B., in delivering the judgment of the court, in that case, says, "Although it is admitted by these pleadings that the

(*a*) 1 *M. & W.* 435. (*b*) 8 *M. & W.* 782.

instrument in question was one calculated to do grievous bodily harm to human beings, still it does not appear to have been set in the wood with that intention; and there is, therefore, nothing in the case to shew that the setting of it by the defendant was an illegal act. It is true that the law, in certain cases, makes an exception to the right of setting instruments capable of causing deadly injuries to human life, where such injury will be a probable consequence of setting them(a): but, with the exception of those cases, a man has a right to do what he pleases with his own land. Now, in the present case, the injurious act was done by the dog to the land of the defendant: and it is no answer to say that the plaintiff could not control the animal, and was therefore unable to guard against the danger. If he chose to walk with his dog along a footpath through ground on which the dog might commit a trespass, he knew the risk he was running; *and the case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it.* In such a case, the party digging the pit would be responsible for the injury, *if the pit were dug across the road*; but, *if it were only in the adjacent field, the case would be very different*, for, *the falling into it would then be the act of the injured party himself.*" That is precisely in point, and, if it be law, which it is submitted it unquestionably is, is decisive of the present case. [*Williams*, J., referred to *Bird* v. *Holbrook*. (b)] That case has not been universally approved. (c) [*Maule*, J. The distinction between those cases and the present, is this,—the nature and office of a dog-spear or a spring-gun, is

(a) See 7 & 8 G. 4. c. 18.
(b) 4 *Bingh.* 628., 1 *M.* & *P.* 607.
(c) See the remark of *Alderson*, B., in *Jordin* v. *Crump*, 8 *M.* & *W.* 789.

to kill or maim; whereas, an area is a necessary convenience to a house.] (a)

2. The declaration does not, upon the face of it, disclose a cause of action. It does not allege that the action would have lain, if death had not ensued. The plaintiff was bound to make the allegation, to bring himself within the statute, so as to enable the defendant to traverse it. [*Maule*, J. To entitle the administrator to sue under this statute, it must appear, either by direct allegation, or by necessary inference, that the husband of the deceased could have maintained an action for any injury she had sustained which did not terminate in her death.] This declaration does not shew that. Further, the declaration should have alleged the duty to have arisen by reason of the defendant's possession of the *area*, and not by reason of his possession of the *messuage*; and the objection is not cured by the addition of the words, "with the appurtenances."

3. There was no evidence to go to the jury, that the way in question was a public way. It appeared to have been used by the public for about twenty-five years; but beyond that there was no evidence. [*Williams*, J. Was there no evidence of the origin of the road?] None whatever. And the circumstance of the land having been during all the time held under leases from the Bishop of *London*, rebuts the ordinary presumption. [*Maule*, J. Might not the bishop grant a way?] Not since the 13 *Eliz. c.* 20. [*Maule*, J. There clearly was evidence to go to the jury here, of an user of this way for a thousand years.] A dedication of a highway is not to be presumed against a reversioner: *Baxter* v. *Taylor*. (b)

(a) See also *Daniels* v. *Potter*, 4 *C. & P.* 262., *Proctor* v. *Harris*, 4 *C. & P.* 337.

(b) 1 *Nev. & M.* 13., S. *C.* 4 *B. & Ad.* 72.

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The court took time to consider, and ultimately directed a second argument, which accordingly took place in *Easter* term, 1849, before *Wilde*, C. J., *Coltman* J., *Cresswell*, J., and *Williams*, J.

Montagu Chambers, for the plaintiff, urged and cited the following additional arguments and authorities. In *Bacon*'s Abridgment, *Highways* (D), it is laid down, that "it is clearly agreed to be a nuisance to dig a ditch, or make a hedge over-thwart the highway, or to erect a new gate, or to lay logs of timber on it, or, generally, *to do any other act which will render it less commodious.*" The right of an individual to enjoy his own land according to his own free will, is more limited in the case of a public than in that of a private right: *Taylor* v. *Whitehead.* (*a*) Keeping gunpowder, or using powder-mills near a highway, is an indictable offence: *Russell* on Crimes (*b*); *Rex* v. *Taylor.* (*c*) So, suffering a house on the highway to be so out of repair as to be in danger of falling: *The Queen* v. *Watts*, or *Watson.* (*d*) So, a person may be indicted for carrying a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the King's subjects: *The King* v. *Vantandillo.* (*e*) In *Firmstone* v. *Wheeley* (*g*), *Pollock*, C. B., in the course of the argument, suggests this very case. "Suppose," he says, "a person digs so near a highway as to render it dangerous, unless fenced by day and lighted by night, that might be a trespass to the soil, for which the lord of the manor, or owner of the land, could maintain trespass; but *there being also a duty to guard the public*,

(*a*) 2 *Dougl.* 745.
(*b*) 2nd edit. Vol. II. p. 297, n.
(*c*) 2 *Stra.* 1167.
(*d*) 1 *Salk.* 357., 2 *Lord Raym.* 856.: and see the indictment, 3 *Ld. Raym.* 18.
(*e*) 4 *M. & Selw.* 73.
(*g*) 2 *D. & L.* 208.

a person injured would have a right to sue in case." In *Lynch* v. *Nurdin* (*a*), the defendant negligently left his horse and cart, unattended, in the street: the plaintiff, a child seven years old, got upon the cart in play: another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt: it was held, that the defendant was liable in an action on the case, though the plaintiff was a trespasser, and contributed to the mischief by his own act. Lord *Denman* there says: "If I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and, if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." In the present case, the duty for the breach of which it is sought to charge the defendant, results from the dangerous position of the pit or area in reference to the highway.

Byles, Serjt., *contrà*. [*Coltman*, J., intimated that the court were fully agreed that the way in question was a public way.] There is no common law duty on the owner of land to fence a ditch or area adjoining a highway. Many instances will readily present themselves, of public walks and highways adjoining cliffs and precipices; among these may be instanced, the ways between *Margate* and *Ramsgate*, and from *Folkstone* to *Sandgate*. So, in the fens, the common fence of the country is a deep ditch, of a date in most cases subsequent to the formation of the roads. [*Wilde*, C. J., mentioned the path along the side of the *New River*, at *Islington*.] Where an individual has acquired,

(*a*) 1 *Q. B.* 29., 4 *P. & D.* 672.

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by prescription, or otherwise, a right to the support of my land, I cannot so use my land as to deprive my neighbour of that support: but, when he has no such right, I may dig to the extreme verge of my own land, without giving him notice. [*Cresswell*, J. So that you do not let his land in.] In *Gale* on Easements (*a*) it is said: "Although there is no direct decision in support of this doctrine, yet the leaning of the courts appears to have been in its favour from a very early period: thus, in *Rolle*'s Abridgment (*b*), it is laid down, 'It seems that a man who has land closely adjoining my land, cannot dig so near mine that mine would fall into his pit; and an action brought for such an act would lie.' 'It may be true,' said Lord *Tenterden*, in delivering the judgment of the court of King's Bench in *Wyatt* v. *Harrison* (*c*), 'that, if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbour digs in his land, so as to occasion mine to fall in, he may be liable to an action.' By the civil law, this right of support from the neighbouring soil, was recognised in the restrictions it imposed upon the doing such acts as would naturally have the effect of withdrawing such support, — 'If a man dig a sepulchre, or a ditch, he shall leave (between it and his neighbour's land) a space equal to its depth; if he dig a well, he shall leave the space of a fathom.'" (*d*) [*Williams*, J. Suppose there be a public right of way across a field, and the owner of the land excavates the soil so as to form a precipice on either side, leaving the pathway untouched, — would he be guilty of a nuisance?] That would, in effect, render the way impassable. The only authority that materially

(*a*) 2nd edit. p. 216.

(*b*) Title *Trespass, Justification* (T.) pl. 1., *Wilde* v. *Minsterly*.

(*c*) 3 *B. & Ad.* 871.

(*d*) *L.* 13, ff. *fin. reg.*

presses the defendant, is *Coupland* v. *Hardingham*: and there the area is alleged to have been *in* the highway. [*Coltman*, J. We have procured the record in that case; it appears that there were two counts in the declaration, the one charging that the cellar was *adjoining*, the other that it was *on* the highway. *Williams*, J. If it was *on* the highway, the defendant could not fence it without being guilty of an indictable nuisance. *Wilde*, C. J. The presumption would be, that the excavation of the areas in *Wood Street* was coeval with the dedication of the way to the public.] So, in *Jarvis* v. *Dean*, it does not clearly appear that the area was not *in* the highway: besides, the point was not discussed there. [*Cresswell*, J. Here is an antient road, with a modern excavation. May not the public acquire a right something analogous to the servitude of the old Roman law, *viz.* that the land adjoining shall be left in such a state as to protect the public in the use of the highway?] No trace of any such distinction is to be found in the books.

If liable at all, the defendant can only be so in respect of his possession of the *area*. [*Cresswell*, J. Is it not part of the appurtenances?] Clearly not. The declaration in substance is, that the defendant, by reason of his possession of *Blackacre* and *Whiteacre*, is bound to fence. That, however, is not so: the liability, if any, arises only by reason of the possession of *Whiteacre*, the excavated place. In *Ricketts* v. *Salwey* (*a*), in an action for disturbance of the plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture, &c.: and it was held that this allegation was divisible, and that proof that the plaintiff was possessed

(*a*) 2 *B. & Ald.* 360.

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of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*. [*Wilde*, C. J. In *Rooth* v. *Wilson* (*a*), *A.* sent his horse, for the night, to *B.*, who turned it out, after dark, into his pasture-field, adjoining to and separated from a field of *C.* by a fence, which *C.* was bound to repair: the horse, in consequence of the bad state of the fence, fell from the one field into the other, and was killed: and it was held, that *B.*, although a gratuitous bailee, might maintain an action against *C.*, and recover the value of the horse.] There is clearly a variance here between the duty alleged, and the duty proved *Yarly* v. *Turnock*. (*b*)

Cur. adv. vult.

MAULE, J., now delivered the judgment of the court.

This was an action on the case founded on the statute 9 & 10 *Vict. c.* 93., "An act for compensating the families of persons killed by accident," and brought by the administrator of *Jane Barnes*.

The declaration (as amended during the trial) alleged that the defendant, before and at the time when &c., was possessed of a messuage, with the appurtenances, near to a common and public foot-way, in front and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said foot-way, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which hole, &c., the defendant, by reason of the possession of the said messuage, with the appurtenances, before and at the said time when &c., ought to have so sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in or along the said foot-way; yet that the defendant, while

(*a*) 1 *B. & Ald.* 59. (*b*) *Palmer*, 269.

he was so possessed of the said messuage, and the said hole, &c., and premises, with the appurtenances, and whilst there was such hole, &c., on &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, &c., to be and continue, and the same was then, so wholly unguarded and not fenced off or railed in, that, by means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said *Jane Barnes*, who was lawfully passing in and upon the said foot-way, slipped and fell into the said hole, &c., and was thereby killed.

The defendant pleaded, — first, not guilty; — secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c.; — thirdly, that he ought not, by reason of his possession of the said messuage, &c., with the appurtenances, to have guarded, fenced off, and railed in the said hole, &c., in manner and form, &c.: on which pleas issues were respectively joined.

At the trial, before *Coltman*, J., at the sittings in *Middlesex*, after *Easter* term, 1847, it appeared that *Jane Barnes* was passing, between eight and nine o'clock at night, on the 26th of *October*, 1849, along a road which had on the one side of it a dead wall, and on the other a row of houses, some of which were finished and some unfinished. It being dark, and no light near, she accidentally fell from a path which was on the road by the side of the houses, into the open area of one of the unfinished ones, which was shewn to have been at that time in the possession of the defendant, and was killed by the fall. The area was separated from the path by a kerb-stone which was intended for the reception of upright iron rails.

On the part of the defendant, it was contended, — first, that there was no sufficient evidence that the foot-path was a public way, — secondly, that a man has a

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right to make a hole in his own ground, and is not bound to fence an adjoining highway against such a hole,—thirdly, that the third issue was not sustained, in its terms, by the evidence.

The learned judge told the jury, that, if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced, or a public way so near that it would produce danger to the public, unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased.

The jury found that there was an immemorial public way abutting on the area, and gave a verdict for the plaintiff, with 300*l.* damages.

The learned judge having given leave to the counsel for the defendant to move the court, on the points suggested by him, a rule was obtained accordingly, to shew cause why a nonsuit should not be entered; and, further, why the judgment should not be arrested, on the ground that the declaration disclosed no good cause of action.

On the argument of this rule, before my brothers *Coltman*, and *Williams*, and myself, it was contended, on behalf of the defendant,—first, that the evidence on the part of the plaintiff furnished no case for the consideration of the jury, as to the existence of an immemorial public foot-way,—secondly, that the obligation of the defendant to fence off the area, was not properly described in the declaration,—thirdly, that no such obligation existed as that alleged: for, that the owner of land is not bound to fence off an excavation in it by the side of a public road.

As to the first point, the court was clearly of opinion that there was sufficient evidence to go to the jury as to the existence of a public foot-way from time immemorial.

As to the second point, the objection was, that the liability of the defendant was alleged to exist in respect of the house and the appurtenances; whereas, on the evidence, it appeared to exist, if at all, by reason of the possession of the appurtenances alone, *i. e.* of the area. But the court was of opinion that the declaration might be regarded as truly describing the origin of the liability of the defendant, *viz.* that he was in the possession of a house, to which an area appertained, abutting on a public foot-way.

On the third point, however, the court felt so much doubt and difficulty, that a second argument was directed, which took place in *Easter* term last, before *Wilde*, C. J., *Coltman*, J., *Cresswell*, J., and *V. Williams*, J.

The arguments for the plaintiff were, that, when a public way has existed from time immemorial, the public have a right to enjoy it with ease and security; and that, if a man prevents that enjoyment, even by the use of his own property, he is responsible as for a public nuisance. And the case was put, of the proprietor of land over which a public way passes, excavating his land on each side thereof, so as to leave the line of way running between two precipices; which, it was argued, would, in effect, make the way impassable, and therefore be a public nuisance. And the cases of *Coupland* v. *Hardingham* (*a*) and *Jarvis* v. *Dean* (*b*) were cited.

Coupland v. *Hardingham* was an action on the case for negligence, in not railing in or guarding an area before a house in *Westminster*, whereby the plaintiff fell down into the area, and was severely hurt. The defence was, that the premises had been in the same condition as far back as could be remembered, and before the defendant became possessed of them. But Lord

(*a*) 3 *Campb.* 398.

(*b*) 3 *Bingh.* 447., 11 *J. B. Moore*, 354.

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Ellenborough held, that, *however long* the premises might have been in this condition, as soon as the defendant took possession of them he was bound to guard against the danger to which the public *had before been exposed;* and that he was liable for the consequences of having neglected so to do, in the same manner as if he himself had originated the nuisance: and the learned judge said that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house, to render it secure.

Jarvis v. *Dean* was also an action on the case to recover damages for an injury occasioned to the plaintiff by his falling at night into an area, which the declaration alleged the defendant wrongfully and negligently to have left open at a house he possessed, in the parish of *Islington*, and in, near, and adjoining a certain street there, which was a common highway. The only point of law decided in the cause, was, as to whether the evidence sufficiently proved a dedication of the road to the public. And the case is only an authority on the present subject, to this extent, *viz.* that it appears to have been assumed as a matter beyond dispute, that the action was well founded, supposing the road was shewn to have been a public one.

On the part of the defendant, it was argued, that no use which a man chooses to make of his own property, can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right; that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area, though

not fenced, could be in any degree detrimental or dangerous.

In support of this view of the subject, reliance was placed on the case of *Blythe* v. *Topham* (*a*), where it was held, that, if *A.*, seised of a waste adjacent to a highway, digs a pit in the waste, within thirty-six feet of the highway, and the mare of *B.* escapes into the waste, and falls into the pit, and dies there; yet *B.* shall not have an action against *A.*, because the making of the pit in the waste, and not in the highway, was not any wrong to *B.*; but it was the default of *B.* himself that his mare escaped into the waste. And, in further support of this doctrine, a passage was cited from the judgment of *Alderson*, B., in *Jordin* v. *Crump* (*b*), where the case is put of a man, who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it. "In such a case," says the learned judge (*c*), "the party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for, the falling into it would be the act of the injured party himself." And, as to the case of *Coupland* v. *Hardingham*, it was not only denied to be law, by the counsel for the defendant, but it was further argued, that, in that case, — as appeared by the original nisi prius record, procured by *Coltman*, J., — as also in *Jarvis* v. *Dean*, — the area was in one count alleged to be *in* the highway.

But it seems clear to us, that, in each of these cases, the area in question was not parcel of the road, but was an area meant to be fenced off from it, in the ordinary way, by upright iron rails, so as to exclude the public

(*a*) 1 *Roll. Abr.* 88., *Cro. Jac.* 158. *Suprà*, 421 (*b*).

(*b*) 8 *M. & W.* 782.

(*c*) *Ib.* 788.

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from it, in a manner quite inconsistent with the notion of its being itself a part of the highway. And, with respect to the case of *Blythe* v. *Topham*, and the passage cited from the judgment in *Jordin* v. *Crump*, it must be observed, that, in these instances, the existence of the pit in the waste or field adjoining the road, is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

In the present case, the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way, at the time the accident happened.

The result is, — considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care,— it appears to us after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for, the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public, is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained, — it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does: but he does not forfeit his right of action for an injury sustained. Thus, in the case of *Bird* v. *Holbrook* (*a*), the plaintiff was a trespasser, — and, indeed

(*a*) 4 *Bingh.* 628., 1 *M. & P.* 607.

a voluntary one,—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred, if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch* v. *Nurdin* (*a*), and also in the case of *Jordin* v. *Crump*, in which the court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed, that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action.

For these reasons, we are of opinion that the declaration in this case discloses a good cause of action; and also that the third issue was properly found for the plaintiff.

The rule, therefore, must be discharged.

Rule discharged. (*b*)

(*a*) 1 *Q. B.* 37., 4 *P. & D.* 677.

(*b*) As to the rule cited from the Digest, *suprà* (which purports to be a translation of a law of *Solon*), see note C. at the end of this volume.

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In the Matter of JOHN FOSTER, a Bankrupt.

Feb. 13.

By a settlement made on the 13th of *July*, 1841, in contemplation of a marriage between *A.* and *B.*, *C.* covenanted to pay to the trustees, so long as *A.* and *B.*, or either of them, or any issue of the said intended marriage, should be living, an annuity of such an amount, as would, either alone, or vest in *A.* and *B.*, in *B.*'s right, or any issue of the marriage, under the settlement of her father and mother, or otherwise,—or together with the annuity produce to arise from any such real or personal estate, after any such devolution or vesting should take place, make up an annuity of 150*l.*, payable half-yearly. The marriage took place. No real or personal estate had devolved upon or become vested in *A.* and *B.* in right of the latter, or in any issue of them. On the 24th of *October*, 1842, a *fiat* issued against *C.*, under which he was declared bankrupt, and under which he obtained his certificate on the 6th of *March*, 1843. The trustees proved against *C.*'s estate, on the 25th of *March*, 1843, for 105*l.*, being partly for arrears due at the time of the bankruptcy, and partly for a proportionate part of the current half-year, up to the time of tendering the proof. They at the same time tendered a proof for the value of the annuity as a contingent debt, but such proof was rejected, on the ground that the contingencies were such that the value of the annuity could not be ascertained. The instalments of the annuity accruing after the date of the said proof, down to the 21st of *September*, 1848, amounted to 823*l.* 16*s.* 8*d.*; on account of which, *C.* had, since his bankruptcy, made payments amounting to 120*l.* In *February*, 1849, the trustees petitioned, praying to be admitted as creditors for the remaining 703*l.* 16*s.* 8*d.*, and to receive dividends thereon not disturbing former dividends:—

Held, that the trustees were not entitled to prove against the estate of *C.* [illegible] of such subsequent instalments.

mother, to certain moneys and other estate and property, and the said *Maria Foster* might also, by other means, become entitled to other real and personal property; and reciting that a marriage had been agreed upon, &c., between the said *William Aggas* and *Maria Foster*, and, upon the treaty for the marriage, it was agreed that the said *John Foster* should, by his covenant, secure the payment, during so long as the said *William Aggas* and *Maria Foster*, or either of them, or any issue of the said intended marriage immediately entitled under the provisions thereinafter contained, should be living, of an annuity or yearly sum of such an amount, but no more, as, either alone, or together with the yearly income to arise or be payable from any real or personal estate, or both conjointly, which should at any time or times, or from time to time, devolve upon or vest in the said *William Aggas* and *Maria Foster*, in her right, or any issue of the said intended marriage, would, after any such devolution or vesting as aforesaid, make up the yearly income or sum of 150*l.* for the time being, to the intent that 150*l.* a year should be always enjoyed by means of the said covenant and real and personal estate so to devolve or vest as aforesaid, or either of them respectively, — it was witnessed, that, in pursuance of the said agreement, and in consideration of the said intended marriage, the said *John Foster* did thereby, for himself, his heirs, executors and administrators, covenant, promise, and agree with and to *Evans*, *Foster*, and *Crompton*, their executors, administrators, and assigns, that, in case the said intended marriage should be solemnized, he, the said *John Foster*, his heirs, &c., should and would pay, or cause to be paid, to *Evans*, *Foster*, and *Crompton*, their executors, &c., during such time and as long as the said *William Aggas* and *Maria Foster*, or either of them, or any

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issue of the said intended marriage immediately entitled under the provisions thereinafter contained, should be living, at or in the common dining hall of *Lincoln's Inn*, in the county of *Middlesex*, between the hours of twelve at noon and two in the afternoon, an annuity or yearly sum of such an amount as, either alone in the mean time and until any real or personal estate should devolve upon or vest in the said *William Aggas* and *Maria Foster*, in her right, or any issue of the said intended marriage, under the said settlement of her said father and mother, and the said thereinbefore-mentioned will, or either of them, or otherwise howsoever, or together with the clear annual produce to arise or be payable from any such real or personal estate, as the case might be, after any such devolution or vesting as aforesaid should take place for the time being, would, from time to time, make up one full annuity or yearly sum of 150*l.* of lawful money of *Great Britain*, and should and would pay the same by two equal half-yearly payments, on the 13th of *January* and the 13th of *July* in every year, without any deduction or abatement whatsoever out of the same or any part thereof, for or on account of any present or future taxes, charges, and impositions.

[A copy of the deed accompanied, and was to be taken as part of, the case.]

The said marriage between *William Aggas* and *Maria Foster* was duly solemnized shortly after the date of the said indenture, and before the bankruptcy hereinafter mentioned; and there has been issue born, one child only, who is now living, and is of the age of six years, or thereabouts.

The said *William Aggas*, and *Maria*, his wife, are both living.

No real or personal estate has yet devolved upon, or become vested in, the said *William Aggas*, and *Maria*,

his wife, in her right, or any issue of them, or the said *Rowland Evans, Thomas Foster*, and *Charles Crompton*, as such trustees under the said indenture, under or by virtue of the said settlement executed on the marriage of the said *John Foster*, the bankrupt, or the will of the said *Thomas Oldham*, or otherwise howsoever.

On the 24th of *October*, 1842, a *fiat* in bankruptcy was duly issued against the said *John Foster*, together with the said *Rowland Evans* and the said *Thomas Foster*, under which the said *John Foster, Rowland Evans*, and *Thomas Foster*, were declared bankrupts: and, on the 8th of *November*, 1842, *George Rowe* (since deceased), *Thomas Moore*, and *Robert Minter*, were chosen creditors' assignees, and *Thomas Massa Alsager* (since deceased,) was appointed official assignee, under the said *fiat*.

On the 25th of *March*, 1843, the said *Rowland Evans, Thomas Foster*, and *Charles Crompton*, as such trustees as aforesaid, tendered a proof under the said *fiat*, against the separate estate of the said *John Foster*, for the value of the said annuity, as a contingent debt: but such proof was rejected, on the ground that the contingencies on which the said annuity depended, were such that the value of the said annuity could not be ascertained.

At the date and issuing of the said *fiat*, the sum of 42*l.* 8*s.* 4*d.* was due and owing to the said *Rowland Evans, Thomas Foster*, and *Charles Crompton*, as such trustees as aforesaid, for arrears of the said annuity; and on the said 25th of *March*, 1843, there was due and owing to the said *Rowland Evans, Thomas Foster*, and *Charles Crompton*, for and in respect of the said annuity, the sum of 105*l.*, including the amount of such arrears, and a proportional part of the current half-year, up to the time of tendering the said proof.

The said *Rowland Evans, Thomas Foster*, and *Charles*

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Crompton, were, on the said 23rd of *March*, 1843, allowed to prove, and were admitted as creditors, against the separate estate of the said *John Foster*, for such sum of 105*l.*

Under the joint-estate, dividends, amounting in the whole to 6*s.* 1*d.* in the pound have been paid to the joint-creditors. The creditors upon the separate estate of the said *John Foster*, including the said *Rowland Evans*, *Thomas Foster*, and *Charles Crompton*, in respect of their said claim for 105*l.*, were paid in full; and a surplus from his separate estate was carried over to the credit of the joint-estate.

On the 6th of *March*, 1843, the said *John Foster* obtained his certificate.

In and during the year 1848, and after such distribution as aforesaid, a further sum of 1211*l.* 4*s.* 6*d.* was received by *Herbert Harris Cannan*, as the official assignee under the said *fiat*, as part of the separate estate of the said *John Foster*, to which he became entitled in right of his wife.

The whole of the said annuity of 150*l.* *per annum* hath continued to be, and still is, payable under and by virtue of the said indenture. The instalments of the said annuity which accrued after the date of the hereinbefore-mentioned proof, down to the 21st of *September*, 1848, amount to 823*l.* 16*s.* 8*d.*

The said *John Foster* has, since his bankruptcy, paid to the said *William Aggas* four several sums of 30*l.* each on account of such last-mentioned instalments, leaving a balance of 703*l.* 16*s.* 8*d.* due in respect of the said annuity.

On the 5th of *February* last, the said *Rowland Evans*, *Thomas Foster*, and *Charles Crompton* presented their petition to Vice-Chancellor *Knight Bruce*, alleging that, under the circumstances hereinbefore stated and appearing, the contingencies upon which the said an-

nuity or debt was payable, had happened, as to the successive payments thereof which had accrued due and become payable since the said bankruptcy; and praying that they might be admitted as creditors for the said sum of 703*l.* 16*s.* 8*d.*, and might receive dividends thereon (not disturbing former dividends): and, by the order of His Honour, made, upon the hearing of the said petition, on the 14th of *February* last, it was ordered that a case should be stated for the opinion of the justices of Her Majesty's court of Common Pleas, upon the following question,—

Whether the said *Rowland Evans, Thomas Foster,* and *Charles Crompton,* are entitled to prove against the separate estate of *John Foster,* the bankrupt, in respect to the said annuity, for the instalments thereof accrued since the 25th of *March,* 1843, the date of the first-mentioned proof, or any or either of them, and receive dividends with the other creditors, not disturbing any former dividends.

Channell, Serjt. (with whom was *Hardy*), in support of the claim of the trustees to prove under the *fiat.* The annuity in question was, before and at the date of the *fiat* against *Foster,* "a debt payable upon a contingency," within the first branch of the 6 *G.* 4. *c.* 16. *s.* 56 (*a*), which is in substance re-enacted in the 12

(*a*) That section enacted, that, "if any bankrupt shall, before the issuing of the *commission* [*fiat,* or the filing of a petition for adjudication of bankruptcy], have contracted any debt payable upon a contingency which shall not have happened before the issuing of such *commission* [*fiat,* or the filing of such petition], the person with whom such debt has been contracted may, if he think fit, apply to the court to set a value upon such debt, and the *commissioners are* [court is] hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be ascertained before the contingency shall

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& 13 *Vict. c.* 106. *s.* 177. (*a*) The authorities are distinct. Thus, in *Ex parte Tindall, in re Gibbins* (*b*), *S.*, by his marriage-settlement, covenanted with the petitioners, as trustees, to pay an annual sum of 80*l.* for himself for life, then to his wife for life, and, after her death, to any issue of the marriage; and that his heirs, executors, or administrators, should, within twelve calendar months after his death, pay to the petitioners the sum of 4000*l.*, on various trusts. *S.* became bankrupt: and it was held that the petitioners were entitled to prove the value of the 4000*l.* as a contingent debt against his separate estate. So, in *Willis, in re* (*c*), it was held, that, under the 6 *G.* 4. *c.* 16. *s.* 56., a claim on a guarantee for a sum certain, when due, is provable as a debt, and, before it is due, is provable as a debt due on a contingency. Where the contingency happens after the date of the *fiat*, but before the whole estate has been distributed, the amount is provable under the second branch of the clause, although its value could not be ascertained at the date of the *fiat*. In *Ex parte Grundy, in re Russell* (*d*), *A.*, in *February*, 1772, covenanted by his marriage-settlement for the payment of 2000*l.*, in case his intended wife, or any issue of the marriage, should survive him: in 1803, a commission of bankruptcy issued against *A.*, under which he obtained his certificate: in *February*, 1825, *A.* died, leaving issue of the marriage: in *May*, 1828, there

have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

(*a*) This section is substantially the same as the former, the only difference being the substitution of the words within brackets for those in *italics*.

(*b*) *Mont. & M'A.* 415.

(*c*) 4 *Exch.* 530.

(*d*) *Mont. & M'A.* 293.

being funds remaining for distribution amongst the creditors of *A.*, a renewed commission was issued, and a final dividend advertised: it was held, that the 6 *G.* 4. *c.* 16. *s.* 56. was retrospective in its operation, and that, although the event upon which the debt was contingent, had happened after the commission issued, and before that statute came into operation, the sum of 2000*l.* was a debt provable under the commission. In *Ex parte Lewis, in re Charman* (*a*), where *A.* advanced 2000*l.* to *B.*, to be repaid on a day certain, and secured by the bond of *C.*, conditioned that, if *B.* made default in payment on the day named, *C.* should pay within one week: *C.* became bankrupt, and *B.* afterwards made default: and it was held that the debt was provable under the commission against *C.* So, in *Ex parte Myers, in re Sudell* (*b*), a debt on a guarantee which did not become absolute before the bankruptcy, was held to be provable as a contingent debt. Here, as the events had continued, during the existence of which the annuity was to be payable, the contingency had happened as to each and every of the sums which became due since the bankruptcy; and the trustees are consequently entitled to prove against the separate estate of the bankrupt, for all the payments which had accrued since the 25th of *March*, 1843.

Willes (with whom was *Maxwell*), *contrà*. *Foster*'s liability to pay the annuity in question does not constitute a debt provable within the 6 *G.* 4. *c.* 16. *s.* 56., by reason of the uncertainty of the amount to be paid *in futuro*, and the impracticability of calculating its value. In *Thompson* v. *Thompson* (*c*), it was distinctly held, that the instalments of an annuity for the payment

(*a*) *Mont. & M'A.* 426.
(*b*) *Mont. & Bligh*, 229.
(*c*) 2 *N. C.* 168, 2 *Scott*, 266.

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of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, provable under a *fiat* against the surety. In *Bennett* v. *Burton* (*a*), by deed of mortgage for a debt of 1000*l.*, the mortgagor covenanted, as a further security, to insure his life for the mortgagee's benefit, deliver the policy to him, and keep the premiums paid till the debt was discharged; and that, if in the mean time the premiums should be in arrear, the mortgagor might pay them, and recover the amount from the mortgagee. The mortgagor afterwards took the benefit of the insolvent debtors' act, 7 *G.* 4. *c.* 57., and included the 1000*l.* debt in his schedule, stating also that the creditor held a policy of insurance on his life, with the joint security of *A. B.* for payment of the premiums. And it was held that the mortgagor was not protected, by his discharge and s. 51., from an action of covenant at the suit of the mortgagee, for premiums becoming due after such discharge, and paid by the mortgagee on the mortgagor's default. And in *Toppin* v. *Field* (*b*), the defendant, being indebted to the plaintiff, assigned to him a policy of assurance on the defendant's life, and covenanted to pay the annual premiums, and, if he did not, and the plaintiff paid them, to repay the plaintiff. The defendant afterwards became bankrupt, and obtained his certificate. A premium accruing due after the bankruptcy, and being unpaid by the defendant, and the plaintiff having paid it, and not been repaid, — it was held, that the defendant was not discharged from liability for these breaches of covenant, by ss. 56. and 121. of the 6 *G.* 4. *c.* 16. In the present case, the annuity not falling within any express provision of the bankr-

(*a*) 12 *Ad. & E.* 657., 4 *P. & D.* 313.

(*b*) 4 *Q. B.* 386., 3 *G. & D.* 340.

rupt act, the arrears accruing due since the *fiat* are not provable as an absolute debt.

Channell, Serjt., was heard in reply.

The following certificate was afterwards sent to the Vice-Chancellor:—

"This case has been argued before us by counsel. We have considered it, and are of opinion that *Rowland Evans*, *Thomas Foster*, and *Charles Crompton*, are not entitled to prove against the separate estate for the instalments mentioned in this question.

"W. H. MAULE.
"C. CRESSWELL.
"E. V. WILLIAMS.
"T. N. TALFOURD."

HEYHOE *v.* BURGE.

Feb. 14.

One who stipulates for a share of *the clear profits* of a particular adventure, is, *quoad* third persons, a partner.

A. and *B.*, by a memorandum in writing, agreed, "for services performed," to allow *C.* a fourth share of *the clear profits* arising from a contract for the construction of a line of railway; and there was evidence to shew that *C.* had acted upon the agreement (though not formally a party to it), and that he had to some extent interfered in the work:—Held, sufficient to shew that *C.* was a partner in the transaction, *quoad* third persons.

DEBT, for work and labour and materials, and for money found due upon an account stated.

Plea, *nunquam indebitatus.*

The cause was tried before *Pollock*, C. B., at the *Norfolk* spring assises, 1847. The facts were as follows:—

The plaintiff was a mason and bricklayer at *Swaffham*, in the county of *Norfolk*. The defendant had formerly been a contractor for railways and other

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public works, but, at the date of the transactions out of which this action arises, had retired from active business, and resided at *Herne Bay*, in the county of *Kent*.

In the month of *July*, 1846, two persons, named *William Fry* and *Daniel Frost*, who had formerly been in the employ of the defendant, entered into a contract with the chairman of a company then called "*The Lynn and Dereham Railway Company*," but since amalgamated with other lines of railway, now known by the name of "*The East Anglian Railway Company*," to construct the portion of the railway between *Narborough* and *Swaffham*, for the sum of 41,029*l.*; and a short agreement between the parties was signed, as the foundation of a more formal contract. The directors requiring two sureties for the due performance of the contract, *Fly* and *Frost* applied to the defendant to become one of such sureties; to which he consented, and thercupon the following agreement was executed:—

"Memorandum of an agreement made this 5th day of *August*, 1846, between Messrs. *Frost*, *Fly*, and *Mathe*[illegible] *son*: the aforesaid *Frost*, *Fly*, and *Matheson* hereby agree, *for services performed*, to give unto Mr. *Georg*[illegible] *Burge*, of *Herne Bay*, one fourth part of *the clear profit* [illegible] arising from a contract made with *The Lynn and Der*[illegible] *ham Railway Company*, for five and a half miles [illegible] rail-road between *Narborough* and *Swaffham*, and the[illegible] further appoint him to be their arbitrator in any dispu[illegible] that may arise between themselves.

(Signed) "*William Fly*.
"*Daniel Frost*.
"*Donald O. Matheson*."

On the 8th of *August*, a second agreement was entered into by *Fly* and *Frost*, of which the following is a copy:—

"Memorandum, 8th *August*, 1846. We, the undersigned, hereby agree to pay Mr. *George Burge*, of *Herne Bay*, any moneys he may advance for us, and interest at the rate of 10*l.* *per cent.* until repaid; and, further, give an order jointly upon *The Lynn and Dereham Railway Company* to receive any moneys that may become due under the contract with them, for the performance of five and a half miles of rail-road upon the *Lynn* and *Dereham* line, or any other moneys that may be due to us, the said *William Fly*, *Daniel Frost*, and *Donald O. Matheson.*

(Signed) "*William Fry*,
"*Daniel Frost.*"

Witness, "*D. O. Matheson.*"

In pursuance of the last-mentioned agreement, *Fly* and *Frost* signed an order, in favour of the defendant, upon the company, as follows: —

"*London*, 8th *August*, 1846.
"*The Lynn and Dereham Railway Company.*

"Gentlemen, — Have the goodness to pay unto Mr. *George Burge*, of *Herne Bay*, any amount due to us for work performed under our contract with you for the execution of a part of the rail-road between *Narborough* and *Swaffham*; and his receipt will be our discharge for the same.

(Signed) "*W. Fly.*
"*D. Frost.*"

On the 15th of *August*, a contract under seal was entered into by *Fly* and *Frost*, as contractors, with the company, for the formation of the portion of the line above referred to: by this deed it was provided, amongst other things, that *Fly* and *Frost* should not make any sub-contract without the leave of the directors, except as to labour,—and that only with the consent in writing

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of the company's engineer. Bonds for the due performance of the contract by *Fly* and *Frost*, were at the same time executed by the contractors, and also by the defendant and *Matheson* respectively as their sureties.

During the progress of the work, several letters were addressed by the defendant to *Matheson*. These letters shewed that the defendant took considerable interest in the work. In one of them, — which bore date the 6th of *December*, 1846, — he says: — "I am glad you have got over your difficulties. If you had been a little positive with Mr. *Hall* (the company's engineer), I consider you could have got a certificate. Look out in time always. Write me to *Bull and Mouth*. Mr. *Fisher* has received the bill of particulars from Mr. *Cox*; and it is necessary, the first opportunity, that we see him together. If you have anything particular to come up for, besides this, you can meet me after *Wednesday* at *Bull and Mouth*: but leave as seldom as possible; you have all had running about enough." In another of these letters, the defendant desired *Matheson* "to keep down all expenses:" and, in another, he sends notice to a person named *Reynolds*, to detain all stone which had been ordered by *Fly* and *Frost*. And, in a letter addressed by him to Messrs. *Hall* & Co., the engineers, the defendant desires them not to let any materials leave the line.

The plaintiff then put in the examination of the defendant under a *fiat* in bankruptcy, issued on the 10th of *November*, 1847, against *Fly*, *Frost*, and *Matheson*. The material parts of this examination were as follows: — "I know the bankrupts, *Fly*, *Frost*, and *Matheson*. *Matheson* is my brother-in-law. *Frost* has worked for me nearly twenty years, at different places; and *Fly*, also, I have employed from time to time to do work for me as a contractor. I have paid them as subcontractors; and I have lent them money to carry on

contracts. They had good credit, and good character: but I should think not much capital. I knew of their tendering for a contract with *The Lynn and Dereham Railway Company*. I first heard of it after they had agreed for it, — about *August*, 1846. In the first instance, they tendered for the contract, and were not successful. But, the directors having for some reason refused to take the party they had previously agreed with, they applied again to *Fly* and *Frost* to take the contract; and *they* then applied to me for assistance. I believe this is the way they got the contract. They advised with me originally as to the quantities, and the prices to be charged for the work. I mean to state that I knew of their tendering for the contract originally. The original contract price was, I think, 45,000*l.*, or thereabouts. I was proposed as, and am, one of the sureties. *I agreed to advance money to carry on the work.* No sum was named. *The agreement under which the advances were to be made, was in writing. I produce the agreement*, dated the 5th of *August*, 1846. [The agreement was set out.] There was another agreement, of the 8th of *August*, 1846, which I also produce. [This agreement also was set out.] That is the agreement I acted upon."

This examination was put in for the purpose of proving the agreement of the 5th of *August*, 1846, — as a statement, under the hand of the defendant, that there was such an agreement, and that he had acted under it, and therefore within the principle laid down in *Slatterie* v. *Pooley*. (*a*)

The lord chief baron, after consulting *Coltman*, J., refused to receive the examination *as evidence of the agreement.*

The *original* was then called for, and produced, but was objected to on the part of the defendant, as being

(*a*) 6 *M. & W.* 664.

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unstamped, and also on the ground that the defendant was no party to it.

To the first objection, it was answered that there was no evidence that the profits, a division of which the agreement stipulated for, amounted to 20*l.*, and therefore no stamp was requisite. And, in answer to the second objection, the plaintiff's counsel put in a further agreement, also dated the 5th of *August*, 1846, and purporting to be made between *Fly*, *Frost*, and *Matheson* (but executed by *Fly* and *Frost* only), and witnessed by *the defendant, in whose handwriting it was*, as follows:—

"Memorandum of agreement, made this 5th of *August*, 1846, between *William Fly*, *Daniel Frost*, and *Donald O. Matheson*: the said *William Fly* and *Daniel Frost* hereby agree to give unto the said *Donald O. Matheson* one fourth part of the net profits arising from a contract made with *The Lynn and Dereham Railway Company*; and they further appoint him to pay and receive all moneys that may be necessary to pay or receive during the performance of the work: and, should any dispute arise between the aforesaid parties, the same is to be decided by Mr. *G. Burge*, of *Herne Bay*.

"Witness (Signed) "*William Fly*,
"*George Burge*." "*Daniel Frost*."

The learned judge thereupon ruled that the two agreements were admissible in evidence: and, in leaving the case to the jury, he told them, that, if they believed those documents to be the documents which they purported by the examination to be, they ought to find that the defendant was interested in the profits, and consequently a partner.

The jury accordingly returned a verdict for the plaintiff, damages 36*l.*,—leave being reserved to the defendant to move to enter a nonsuit.

O'Malley, in *Easter* term, 1848, accordingly obtained a rule nisi to enter a nonsuit, and also for a new trial, on the ground that the verdict was against evidence. He submitted that there was no evidence that the defendant had ever assented to the agreement of the 5th of *August*, 1846; and that, even if there was, the agreement did not constitute him a partner with *Fly* and *Frost*, nor did he, not being a party thereto, acquire any legal right under it; and that the agreement was without consideration.

Byles, Serjt., and *Bramwell*, shewed cause against that rule, in *Trinity* term, 1848. They submitted that the stipulation to receive a share of profits constituted *Burge* a partner with *Fly* and *Frost*, — citing *Vinnius* (*a*), *Gilpin* v. *Enderby* (*b*), *Bond* v. *Pittard* (*c*), *Smith*'s Mercantile Law (*d*), and *Story* on Partnership. (*e*)

Channell, Serjt., and *O'Malley*, in support of the rule, insisted that the agreement of the 5th of *August*, 1846, was a mere inchoate agreement for a participation in profits, which was never carried into effect, and therefore did not constitute a partnership; and they referred to *Pott* v. *Eyton* (*g*) and the authorities there cited.

COLTMAN, J. It appears to the court (*h*) that there was in this case a question of fact which ought to have been submitted to the jury, *viz.* whether the defendant had assented to the agreement of the 5th of *August*,

(*a*) *Vinn. Comm. in Inst.* Book III. tit. xxvi. *De Societate.*
(*b*) 5 *B. & Ald.* 954.
(*c*) 3 *M. & W.* 357.
(*d*) 3rd edit. p. 21., 4th edit. p. 19.
(*e*) Ch. IV. §§ 54. 60. 75.
(*g*) *Antè*, Vol. III. p. 32.
(*h*) *Coltman*, J., *Maule*, J., *Cresswell*, J., and *Williams*, J.

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1846. We think that the omission to present that to the jury, and dealing with the whole as a question of law, was a miscarriage, and, consequently, that the rule should be made absolute for a new trial.

Rule absolute, according.

Upon the second trial, before *Parke*, B., at the summer assises for *Norfolk*, in 1848, the same evidence was again given; and it was further proved, that the work in respect of which the plaintiff sought to recover, was work done by him under a sub-contract, for which there was no leave of the directors, or consent of the engineer, as required by the original contract of the 15th of *August*, 1846.

On the part of the defendant, the objections which were taken on the former trial, were again urged; and it was further insisted, that there was no evidence that *Burge* had acted upon the agreement of the 5th of *August*, 1846; that the subsequent agreement of the 8th of *August* was inconsistent with, and evidently intended to be substituted for, the former; that the interference of the defendant, as evidenced by his letters, arose from an anxiety, which as a surety he would naturally entertain, that the contractors should so proceed with the work as to save him from personal responsibility; and that, assuming that the defendant was bound by the agreement of the 5th of *August*, 1846, or that there was evidence that he had acted upon and taken an interest under it, it did not bind him *quoad* contracts, like the present, entered into by *Fly* and *Frost* without the scope and authority of the deed of the 15th of *August*, 1846.

For the plaintiff, it was insisted that the agreement of the 5th of *August*, 1846, if not *per se* a contract binding the defendant, it must be assumed, from the circumstance of his having it in his possession, and from

his subsequent conduct, that he meant to act, and did act, upon it.

The learned baron, in presenting the case to the jury, told them that the first question for them to consider, was, whether there was a partnership between the defendant and *Fly* and *Frost*,—whether he entered into a contract with them to share in the profit and loss of the particular adventure; that, if the defendant did actually agree, by a binding contract, to take a share of the profits of the adventure, in point of law he was a partner, and authorised every thing that was necessary for the purpose of carrying the contract into effect, and constituted *Fly* and *Frost* his agents for the purpose of entering into any sub-contracts which might be necessary for that purpose. His lordship then proceeded to comment upon the examination of the defendant under the *fiat*, as to which he said that "he could not help observing that the examination was conducted in a somewhat artful manner; for, that the examiner had never ventured to put to the defendant, as he ought in fairness to have done, the precise question, whether he had agreed beforehand, and upon what consideration, and upon what terms, with *Fly* and *Frost*, to become a partner in the adventure, but had contented himself with resting the plaintiff's case upon inferences arising from answers which the defendant had given to other questions, and from the production of the documents by him." And, when he came to that part of the examination in which the defendant said—"I agreed to advance money to carry on the work: no sum was named: the agreement under which the advances were to be made, was in writing,"—the learned judge said,—"Then the examiner just interposes this agreement of the 5th of *August* which is said to constitute a partnership, not being at all the agreement for the advance of the money: and then

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there is put in and read by the officer the agreement that is produced by the defendant. It is dated the 5th of *August*. Then the officer gives you an account of the contents of the instrument in the examination. It is, 'Memorandum of agreement made the 5th of *August* 1846, between Messrs. *Fly* and *Frost* and *Matheson*, those three persons being apparently then the partners in the contract. You will observe there is another agreement of the same date entered into between *Fly* and *Frost* and *Matheson*, to give *Matheson* another fourth share of the profits; and on the same day there is an agreement made, not purporting to be between *Fly* and *Frost* and the defendant, but *in the defendant's possession*, — *produced* by him, — an agreement by *Fly* and *Frost* to give him a fourth of the profits, for services performed. Now, the learned counsel objected to this agreement, and said it could not be a binding agreement, because the instrument did not purport, upon the face of it, to be an agreement between *Fly* and *Frost and the defendant*. I think there is nothing in that objection, inasmuch as it is quite clear that the object of the agreement was, to give the defendant a share of the profits, and inasmuch as the instrument may be presumed to have been intended for the defendant, who upon his examination produced it; and therefore, if he received an instrument in these terms, although it did not mention his name as a contracting party, yet, if they agreed to give him a share of profits, and handed over the document to him, it is ample evidence that he was a party to it. The objection that it is not an agreement with the defendant *nominatim*, is, I think, invalid. This agreement purports to give the defendant a fourth part of the clear profits, not the gross profits, of the contract. A person who shares *gross* profits is not a partner; but a person who shares *net* profits is *primâ facie* to be considered as a partner."

His lordship then read the agreement; and, after adverting to the agreement of the same date, to give another fourth of the profits to *Matheson*, he proceeded, —"If you take the literal words that are used by the defendant in his examination, this contract is not a binding contract; because, in the first place, it is only an offer of a remuneration for services already performed, which could not be enforced by action. In the next place, it does not appear from the examination, that this agreement was acceded to, or acted upon, by the defendant; for, he goes on to say, — 'There was another agreement, of the 8th of *August*, 1846, which I also produce.' [His lordship read that agreement.] 'That,' he says, 'is the agreement I acted upon.' Then, they do not ask him whether he acted upon the first agreement, by which he was to share in the profits, and what the consideration for that agreement was. And, this matter having been before the court of Common Pleas, it appears one of the questions which they thought ought to be left to the jury, was, whether the agreement was assented to, and whether it had been acted upon by the defendant: because, if he never assented to it, he could not be made a partner. According to the literal terms of the examination, all that the defendant does, is, to produce the instrument from his possession; and he says no more about it. The plaintiff's counsel argue, that, inasmuch as the defendant chose to take possession of the agreement, it must be assumed that he meant to act upon it. I can only repeat, that it would have been much more fair and honest to have asked the defendant whether he had assented to it. One question which appears to have been dwelt upon in the court of Common Pleas, was, whether the agreement of the 8th of *August*, under which the defendant was to advance money at 10*l.* *per cent.*, was not substituted for the former agreement.

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And it certainly does seem rather a strong thing to say that the defendant was to have 10 *per cent.* upon his advances, and *also* a fourth share of the net profits. If this really was the case, — that the agreement of the 8th was substituted for that of the 5th of *August*, — then the defendant was not a partner." "Particular reliance is placed by the plaintiff's counsel upon the examination. They say, that, although perhaps, if literally construed, it would not afford evidence of an admission by the defendant that he was a partner, yet, coupling it with the contemporaneous agreement of the 5th of *August*, there is evidence of an agreement between these four persons, — *Fly*, *Frost*, *Matheson*, and the defendant, — that they were to share in the profit and loss of the adventure: and, further, that the agreement of the 8th of *August* was not in substitution of the former agreement, but was additional, — that the defendant was to have, besides one fourth of the profits, 10 *per cent.* upon the money he advanced. If it was so, it was a very good bargain. The defendant's counsel, on the other hand, say that that is not the fair inference to be drawn from the defendant's examination. It is for you to judge how that is. And, in order to arrive at a proper conclusion, you must take into your consideration the other evidence which has been given on the part of the plaintiff." The learned judge then proceeded to comment upon the defendant's letters, saying, — "You will have to judge of the effect of these letters. They certainly are quite consistent with the supposition that the defendant was a partner, because they shew that he takes an interest about the partnership concern: he writes to *Matheson*, objecting to his being absent, urging the necessity of economy, the making of all their contracts as cheaply as possible; in short, taking an interest in every thing they do, as one who expected to profit by it. You will have to say whether these

ı, taken in conjunction with the defendant's ex-
ıtion, satisfy you that he was a partner. The
dant says that these letters are consistent with
ıpposition that he was *not* a partner; that he took
:erest in the concern, as an old friend; that he was
sted, because he was a surety, and, if the con-
ırs failed in the undertaking, he would be re-
ible to the company for their breach of contract:
besides, he had advanced the contractors large
of money, and the hope of being repaid was an-
inducement for the interest he took. You will
vhich of these suppositions these letters, in your
nent, accord with. If you think they warrant
nference that the arrangement was, that the de-
nt was a partner, and intended to share the profits,
must be satisfied that he adopted the first agree-
; and you are to form your judgment upon the
of these letters, to assist you in arriving at a
usion. Upon the whole of the facts, taken to-
r, the question will be, whether you are satisfied
this was a binding agreement, — not a mere pro-
but a binding agreement, — that the defendant
d have a share of the net profits of carrying into
this particular contract. If you are not satisfied
at, there is an end of the plaintiff's case, because
vhole rests upon the inference to be drawn, of the
ıdant's being a partner in the profit and loss of the
act. If he is *not* a partner in the profit and loss,
the defendant is entitled to your verdict. But,
ı are satisfied that he *was* a partner in the con-
, then the defendant is, I think, responsible for all
ıcts done by *Fly* and *Frost*, which were necessary
he purpose of carrying the contract into effect."
ıswer to a remark of the defendant's counsel, that
cannot be a partnership constituted by persons
ıing to share the profits of an individual trans-
n, the learned baron said: "I am of opinion that

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the rule of law as to sharing net profits, is not confined to general dealings of that nature; but is also applicable to particular transactions, — that, if a person agrees to share with another, by a binding agreement, the profits of a particular adventure, they are partners in that particular adventure. Sometimes cases arise in which a person, although he is taking a share of the profits, is not a partner for some purposes; such, for instance, is the case in the whale-fisheries: it is well known by persons conversant with that trade, that the master, the mates, and the seamen, all take a share in the ultimate profits of the voyage, proportioned to their rate of wages; but that does not constitute them partners, so as to render them liable for articles supplied in the equipment of the vessel; it is only a mode of remunerating them for their services. But, where a person stipulates for a share in the net profits of a concern, and has a right to an account of the net profits as a partner, he is liable, although the partnership is limited to a single transaction or adventure."

The learned baron then proceeded to the second point, saying,—"If you are satisfied that there was this contract between *Fly* and *Frost* and the defendant, then comes the question whether *Fly* and *Frost* were authorised to enter into a contract for the work in respect of which it is now sought to charge the defendant as a partner. Now, it is material to look at the contract between *Fly* and *Frost* and the railway company, to see whether that authorised such a transaction as this; for, if the contract expressly prohibited the employment of any person in the situation of the plaintiff to do any part of the work, then it could not be said to have been done with his authority: by becoming a partner in the contract, he only authorises the doing of that which was necessary for carrying the contract into effect. The contract contains this clause,

—'And, further, that they, the said *William Fly* and *Daniel Frost*, or either of them, or their or his executors or administrators, shall not nor will, unless with the previous consent of the said company, signified in writing under the hands of three directors thereof, make any sub-contract or sub-contracts for the several works hereby contracted to be executed, or any of them, except as to labour only, and then only with the consent of the principal engineer for the time being of the said company; and shall not nor will, unless with such consent as aforesaid, signified as aforesaid, assign or underlet this contract, or any part thereof.' If the work in respect of which this action is brought, had been done by the plaintiff under a sub-contract with *Fly* and *Frost*, there would have been very great weight in the objection; and I think the defendant could not be made responsible in respect of such sub-contract, unless there were some other evidence than the mere fact of his being a partner, of his having sanctioned the work. But it appears to me that this is not a sub-contract within the meaning of this clause of the deed; the work was to be charged for at measure and value. I will, however, ask your opinion whether, independently of the construction which I put upon the contract, the defendant has by his conduct sanctioned this particular work. If it is not prohibited by the contract, there is considerable evidence which would tend to satisfy you that the defendant must have contemplated that *Fly* and *Frost* could not have done the work by themselves or their own servants, but must have had recourse to others to complete the undertaking, — carpenters, masons, bricklayers, slaters, &c.; and therefore you may reasonably conclude that the defendant, if a partner, would concur in that mode of carrying the contract into effect."

And, in conclusion, his lordship said, — "The ques-

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tion for you to decide in the first place, is, are you of opinion that there was a binding contract between the defendant and *Fly* and *Frost*, that the former should share in the profits of the adventure? And, secondly, if there was, are you of opinion that the work in question was necessarily done in carrying the original contract into effect? And, further, do you think that this particular work was sanctioned by the defendant? If you are of opinion in the affirmative upon those points, the plaintiff will be entitled to your verdict. If you are not satisfied that the defendant was a partner in the profit and loss of the adventure, and that the execution of the contract necessarily required the employment of the plaintiff in order to carry it completely into effect, your verdict will be for the defendant."

The jury returned a verdict for the plaintiff, damages 354*l.*

O'Malley, in *Michaelmas* term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence.

Byles, Serjt., *Willes*, and *Couch*, in *Trinity* term last, shewed cause. The main objection to the agreement of the 5th of *August*, 1846, was, that, the defendant was no party to it, and therefore there was no mutuality. But there is no rule of law, that one who is not expressly named as a party cannot avail himself of a contract, if he has assented to and acted under it: *Goldshede* v. *Swann.* (*a*) It is true, the agreement was not executed by the defendant: but there was ample evidence that he had assented to it; and it came out of his possession when he was examined under the *fiat* against *Fly* and *Frost* and *Matheson*. It is clear, that, under that agree-

(*a*) 1 *Exch.* 154.

ment, he would have a remedy in equity against *Fly* and *Frost* for an account of profits. There was, therefore, abundant evidence to warrant the verdict. Then, as to the alleged misdirection, — it is quite clear, upon the authorities, that a stipulation for a participation in the net profits of a particular adventure constitutes a partnership, just the same as an agreement to share in the profits of trade in general. In *Grace* v. *Smith* (*a*), *De Grey*, C. J., says: "If any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment." [*Cresswell*, J. That reasoning does not apply to an isolated transaction.] The rule is applied to a single adventure, in the subsequent case of *Hesketh* v. *Blanchard*. (*b*) In *Waugh* v. *Carver* (*c*), *Eyre*, C. J., said, that, "upon the authority of *Grace* v. *Smith*, he who takes a moiety of all the profits indefinitely, shall by operation of law be made liable to losses, if losses arise, upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace* v. *Smith*: and I think it stands upon the fair ground of reason." And in *Smith* v. *Watson* (*d*), *Bayley*, J., says: "A right to share in the profits of a particular adventure, may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself which is the subject-matter of the adventure." In *Pott* v. *Eyton* (*e*), this court held, in conformity with the rule laid down in *Grace* v. *Smith*,

(*a*) 2 Sir *W. Blac.* 998.
(*b*) 4 *East*, 144.
(*c*) 2 *H. Blac.* 235.
(*d*) 2 *B. & C.* 401. 407., 3 *D. & R.* 751.
(*e*) *Antè*, Vol. III. p. 32.

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that one who takes a share of *the profits*, as such, of a trading concern, thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which the creditors have a right to rely for payment. In *Bond* v. *Pittard* (*a*), *A.* and *B.* carried on business together as solicitors, in partnership, and held themselves out as such, and the defendant employed them in that capacity. By the agreement under which *A.* and *B.* entered into business together, *B.* was to receive annually *out of the profits* the sum of 300*l.*, but he was not to be in any manner liable to the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner. It was held that *A.* and *B.* were properly joined as plaintiffs in an action for work and labour, as the money when recovered would be the joint property of both, until the accounts were ascertained, and the division took place. *Parke*, B., there says: "In *Gilpin* v. *Enderby* (*b*), a person who, by a partnership deed, was exempted from all possibility of loss, was held to be a partner, though of an unusual kind, and so considered by the court, in giving judgment." In *Ex parte Rowlandson* (*c*), Lord *Eldon* says it is settled, "that, if a man, as a reward for his labour, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner, and no arrangement between the parties themselves could prevent it." *Ex parte Gellar* (*d*) is an authority to the same effect. In *Gouthwaite* v. *Duckworth* (*e*), *A.* and *B.*, general partners in trade, being indebted to *C.* for advances paid by him on the joint account of the three in

(*a*) 3 *M.* & *W.* 357.
(*b*) 5 *B.* & *Ald.* 954., 1 *D.* & *R.* 570. And see *Enderby* v. *Gilpin*, 5 *J. B. Moore*, 571.
(*c*) 1 *Rose*, 89.
(*d*) 1 *Rose*, 297.
(*e*) 12 *East*, 421.

the purchase of tobacco which had been sent out on a special joint adventure to *Spain*, — with a view to liquidate that balance, *C.* agreed with *A.* and *B.* to join with them in another adventure to *Lisbon*, of which he was to have one moiety; and it was agreed that *A.* and *B.* should purchase goods for the adventure, to be shipped on board a certain vessel, and pay for them, and the returns of such adventure were to be made to *C.*, to go in liquidation of his demand on them; but *C.* was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns, the amount of his advances previously made to *A.* and *B.*: it was held, that this agreement constituted a *partnership* between the three in the adventure, *at and from the time of the purchase of the goods for the adventure* by *A.* and *B.*, although *C.* did not go with them to make the purchase, or authorise them to purchase on the joint account, but *A.* and *B.* alone in fact made the purchase; and although *C.* also purchased in his own name, and paid for, goods to be sent out at the same time, in which *B.* was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three. And *Grose*, J., said: "I think this is a strong case of partnership, within the description given of it by Lord Chief Justice *De Grey* in the case cited" — *Grace* v. *Smith*. In *Cheap* v. *Cramond* (*a*), a merchant in *London* recommended consignments to a merchant abroad, and it was agreed that the commission on all sales of goods recommended by one house should be equally divided, without allowing any deduction for the expenses: and it was held that this was a participation in profit, and constituted a partnership between the parties *quoad hoc*.

(*a*) 4 *B. & Ald.* 663.

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This clearly was a partnership, according to the principles laid down by all the text-writers. In *Vinnius's* Commentary on the Institutes (*a*), it is said, — "*De damno nihil adjeci, quia lucrum tantum sperant spectantque socii, damnum præter votum eorum accidit. Sed nec damni communio ad substantiam societatis pertinet: quippe quæ etiam ita constitui potest, ut unus e sociis damni sit expers.*" So, in *Smith's* Mercantile Law (*b*), it is said: "There may be a partnership in *one transaction*, as well as in a continuing business, and between persons out of trade, as well as in trade, since, in either case, there may be a combination of property or labour, in order to a common undertaking and a common profit. (*c*) This community of profit is the criterion whereby to ascertain whether a contract is really one of partnership; for, one partner may stipulate to be free from *loss*, and the stipulation will hold good as between himself and his companions (*d*), *though it will not diminish his liability to strangers.*" (*e*) So, *Story*, in his Treatise on Partnership, lays the rule down thus (*g*): "The cases in which the liability as partners as to third persons exists, may be distributed into the following classes, — first, where, although there is no community of interest in the capital stock, yet the parties agree to have a community of interest, or participation, in the profit and loss of the business *or adventure*, as principals, either indefinitely, or in fixed proportions, — so-

(*a*) Book III. tit. xxvi.

(*b*) 3rd edit. p. 21.; 4th edit. p. 19.

(*c*) *Ex parte Geller*, 1 *Rose*, 297.; *Salomons* v. *Nissen*, 2 *T. R.* 674.

(*d*) *Fereday* v. *Hornderne*, *Jacob*, 144.; *Gilpin* v. *Enderby*, 5 *B. & Ald.* 954.; *Bond* v. *Pittard*, 3 *M. & W.* 357. See 18 *Ves.* 300.: unless, indeed, such stipulation be inserted as a mask to disguise usury; *Jestons* v. *Brooke*, *Cowp.* 793.; *Morse* v. *Wilson*, 4 *T. R.* 353.

(*e*) *Waugh* v. *Carver*, 2 *H. Blac.* 235., 1 *Smith's Leading Cases*, 491.; *Jacob*, 147., *per* Lord *Eldon*.

(*g*) Ch. IV. § 54.

ndly, where there is, strictly speaking, no capital ock, but labour, skill, and industry, are to be contri- ted by each in the business, as principals, and the ofit and loss thereof are to be shared in like manner, thirdly, *where the profit is to be shared between the rties as principals, in like manner, but the loss, if any ises beyond the profit, is to be borne exclusively by one rty only,* — fourthly, where the parties are not in ility partners, but hold themselves out, or at least are ld out by the party sought to be charged, as partners, third persons, who give them credit accordingly, — hly, where one of the parties is to receive an annuity t of the profits, or as a part thereof." It is to the rd class that the present case more immediately be- gs. The learned author proceeds, in § 60, — "In next place, as to the class of cases where the parties to share the profits between them, if any, as prin- als, but the losses are to be borne exclusively by one rty. It is here that the pressure of the general doc- ne, that a participation in the profits, as profits, ates a partnership between them, is most severely t, and is most difficult to maintain, upon general soning. In all this class of cases, it is the intention the parties that no partnership shall exist between emselves; and the common law, in this respect, gives l force and effect to that intention. But, in regard third persons, the common law holds that the mere ht to participate in the profits creates a partnership ween the parties, notwithstanding there is no parti- ation in the losses, *ultrà* the profits, and it is not ir intention to be partners. The doctrine here seems be founded in part upon the consideration, that, even such a case, there is incidentally, and to a limited ent, a participation in the losses, as well as in the fits; for, before it can be ascertained that there are profits, the losses must first be deducted, and the

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residue only shared as profits. But the main reason is, that which has been already adverted to as the first foundation of the doctrine, to wit, that every man who has a share of the profits of a trade or business, ought also to bear his share of the loss; for, if one takes part of the profit, he takes a part of the fund on which the creditor of the trader relies for his payment." He then proceeds, in § 75, to treat of partnerships in a single transaction or adventure. "Special partnerships, in the sense of the common law, are those which are formed for a special or particular branch of business, as contradistinguished from the general business or employment of the parties, or of one of them. They are more commonly called limited partnerships, when they extend to a single transaction or adventure only; such as, the purchase and sale on joint account of a particular parcel of goods, or the undertaking of a voyage or adventure to foreign parts upon joint account. But the appellation may be applied indifferently, and without discrimination, to both classes of cases. They, therefore, fall within the denomination of the Roman law. *Societas sive negotiationis alicujus, sive vectigales, sive etiam rei unius.*" *Barry* v. *Nesham* (*a*) is also a distinct authority to shew that this was a partnership *quoad* third persons.

Channell, Serjt., *O'Malley*, and *Worlledge*, in support of the rule. So far as direct decision is concerned, the question presented to the court in this case is a new one; and the *dicta* which are to be found scattered through the cases upon the subject, have not met with the approval of jurists in any other commercial country. And this doubtful law is sought to be supported and enforced upon evidence most questionable, — consisting mainly of an examination under a *fiat* in bankruptcy,

(*a*) *Antè*, Vol. III. p. 641.

conducted with consummate craft, and evidently with a view to this action. Taking the whole of the evidence together, the fair result is, that the defendant never intended to become a partner; and that, in truth, the agreement of the 5th of *August* was never acted upon, but that of the 8th was substituted for it. The former constituted no binding contract; the defendant was no party to it, and could not have enforced it. It is not like a proposal, which may be evidence of an agreement, where it appears only to be a part of the contract. But, where the instrument on the face of it purports to be, not evidence of a contract, but to be an agreement between other parties, it cannot be eked out by parol evidence. Besides, there is no sufficient consideration to support it. Assuming that the memorandum of the 5th of *August*, was a binding contract, and that it conferred upon the defendant a legal right to participate in the profits of the adventure, the question is, whether a right to share in the profits of a single undertaking or adventure constitutes a partnership, where there has been no actual participation in profits, and where the party sought to be charged as a partner has not been dealt with as such, or been in any way held out as a partner. None of the cases cited tend to establish that proposition. In *Elgie* v. *Watson* (*a*), by an agreement in writing, *W.* agreed with *E.* to advance him a sum of money, for the purpose of manufacturing certain inventions; and it was agreed, that, if the inventions should become of public or private use, *W.* should be entitled to one third of the profits of the inventions. The agreement contained an express promise on the part of *E.* to repay the sums of money advanced by *W.*: and it was held, in an action brought by *W.* to recover the money thus advanced, that this

(*a*) 5 *M.* & *W.* 518.

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agreement did not constitute a partnership between the parties with respect to that sum. And in *Wilson* v. *Whitehead* (a), *A.*, *B.*, and *C.* verbally agreed that they should bring out, and be jointly interested in, a periodical publication: *A.* was to be the publisher, and to make and receive general payments, *B.* to be the editor, and *C.* the printer; and, after payment of all expenses, they were to share the profits of the work equally: *C.* was to furnish the paper, and charge it to the account, at cost prices: no profits were ever made, nor any accounts settled: the plaintiff furnished paper to *C.*, for the purpose of being used by him in printing the periodical; and it was held that *A.* and *B.* were not jointly liable with *C.* for the price of it. Consistently with that case, it is impossible to hold the defendant liable as a partner in this case.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This was an action of debt brought by the plaintiff against *Burge*, to recover the price of certain work done upon a railway, which was formerly called "*The Lynn and Dereham Railway*," but which is now consolidated with other lines of railway, called "*The East Anglian Railway*."

At the trial before *Parke*, B., at the *Norfolk* summer assises, 1848, it appeared that two persons named *Fly* and *Frost* had entered into a contract with *The Lynn and Dereham Railway Company*, for certain work to be done on that railway, and that part of the work had been executed by the plaintiff, who claimed payment for the same from the defendant, alleging him to be a partner with *Fly* and *Frost*, who had become bankrupt.

(a) 10 *M. & W.* 503.

The plaintiff put in the examination of the defendant, taken under a *fiat* in bankruptcy against *Fly* and *Frost*. From that examination, it appeared that a certain agreement had been entered into between the defendant and *Fly* and *Frost*, and one *Matheson*. Evidence was also given of a contract made by *Fly* and *Frost* with *The Lynn and Dereham Railway Company*, under seal, dated the 15th of *August*, 1846, for the construction of five miles and a half of railway, from *Swaffham* to *Narborough*, — *Fly* and *Frost* not to make a sub-contract without the leave of three of the directors, except as to labour, and that only with the consent in writing of the engineer. Three bonds were also put in; one, from *Fly* and *Frost*, to the company; the others, by the defendant and *Matheson*, respectively, as sureties for them. Three agreements, which appeared in the examination of the defendant under the *fiat*, were also read. The first, which was dated the 5th of *August*, 1846, was in these terms: —

"Memorandum of an agreement made the 5th day of *August*, 1846, between Messrs. *Fly*, *Frost*, and *Matheson*; — the aforesaid *Frost*, *Fly*, and *Matheson*, hereby agree, for services performed, to give unto Mr. *George Burge*, of *Herne Bay*, one fourth part of the clear profits arising from a contract made with *The Lynn and Dereham Company*, for five miles and a half of rail-road, between *Naboro'* and *Swaffham*; and they further appoint him to be their arbitrator in any dispute that may arise between themselves.

(Signed) "*William Fly.*
"*Daniel Frost.*
"*Donald O. Matheson.*"

The second agreement, of the 8th of *August*, 1846, was in these terms: —

"We, the undersigned, hereby agree to pay Mr. *George Burge*, of *Herne Bay*, any moneys he may ad-

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vance for us, and interest at the rate of 10*l.* *per cent.* until repaid; and, further, give an order jointly upon *The Lynn and Dereham Railway Company,* to receive any moneys that may become due under the contract with them, for the performance of five miles and a half of rail-road upon the *Lynn* and *Dereham* line, or another moneys that may be due to us, the said *William Fly, Daniel Frost,* and *Donald O. Matheson.*

(Signed) "*William Fly.*
"*Daniel Frost.*"

"Witness, *D. O. Matheson.*"

There was a third agreement, by which *Fly, Frost,* and *Matheson* agreed jointly to give an order to *Burge* on *The Lynn and Dereham Railway Company,* to receive any sums of money due to them. There were also letters given in evidence, written by the defendant, *Burge,* during the progress of the work for which this action was brought. From these letters, the defendant appeared to take great interest in what was going on, and in one, of *December,* 1846, addressed to *Matheson,* the defendant says, — "I am glad you have got over your difficulties. If you had been a little positive with Mr. *Hall* (the engineer), I consider you could have got a certificate. Look out in time always. Write me to *Bull and Mouth.* Mr. *Fisher* has received the bill of particulars from Mr. *Cox;* and it is necessary, the first opportunity, that we see him together. If you have any thing particular to come up for besides this, you can meet me after *Wednesday* at *Bull and Mouth:* but, leave as seldom as possible: you have all had running about enough." In another letter, he desires *Matheson* to keep down all expenses; in a third, he sends notice to a person named *Reynolds,* to detain all stone which had been ordered by *Fly* and *Frost;* and in another, addressed to Messrs. *Hall* & Co., he desires them not to let any materials leave the line.

Upon this evidence, the learned baron left it to the jury to say whether, upon the whole, they were satisfied that a binding agreement had been made between the defendant and *Fly* and *Frost*, that the defendant should have a share of the profits of carrying on the contract with the company, and whether that agreement was acted on, when the contract with the plaintiff for the work executed by him was made; telling them, that, if there was such binding contract, that would make him a partner with *Fly* and *Frost*, and communicate to them an authority to make all contracts necessary to carry into effect the objects of the partnership, as usual in similar businesses.

It had been contended, on the part of the defendant, that, even if such partnership existed, it must be governed by the terms of the deed entered into between *Fly* and *Frost* and the company, — which did not authorise the making of a sub-contract, except for labour. This, it was said, was a sub-contract, and was not for labour; therefore, no such implied authority was given to *Fly* and *Frost* by the defendant.

The learned baron also asked the jury, whether, independently of the deed, the plaintiff was in the employ of the defendant.

The jury found both questions for the plaintiff.

A rule nisi for a new trial was granted, on the ground of an alleged misdirection by the learned baron, and also on the ground that the verdict was against evidence.

The argument as to misdirection, was, that, the agreement between the parties being at the utmost for the share of the profits of one single transaction, it did not constitute a partnership; and, secondly, that a written instrument whereby *Fly* and *Frost* promised to give *Burge* a share of the profits, was unilateral only, that there was no consideration given for it, and that *Burge* was no party to it, and consequently there was no binding agreement for a share of the profits.

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As to the first point, it has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction, constitutes a partnership (*a*), and authorises them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken.

With regard to the second point, the argument proceeded on a misapprehension as to the direction of the learned judge. He did not tell the jury that the written contract alone made a binding contract: but he left it to them to say whether they were satisfied of the existence of such a contract, from the whole of the evidence. To this direction it was impossible to object; for, unquestionably, there was evidence of the existence of a contract for their consideration.

The argument turned so much on the question, whether that instrument alone was sufficient to constitute a partnership, that we thought there must be some misapprehension as to the meaning of the learned baron's report. We have, therefore, referred to him; and find that he intended to report that which he apparently reported, *viz.* that he had left the question to the jury *on the whole of the evidence,* — not leaving it that that instrument constituted a partnership: on the contrary, he said it would not.

As to the verdict being against evidence, — it is not by any means apparent, on reading the report; and, on referring to the learned baron, he states that he considered the question to be one upon which the jury might fairly find either way; and he is not at all dissatisfied with the conclusion at which they arrived.

Both grounds for a new trial, therefore, fail, and the rule must be discharged.

Rule discharged.

(*a*) *i. e.* a *quasi* partnership: *vide Barry* v. *Nesham, ante* Vol. III. pp. 641. 650.

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A plea framed in accordance with the 10th section of the 5 & 6 *Vict. c.* 116., is no bar to an action brought against an insolvent in respect of a debt contracted before the date of filing his petition under the 7 & 8 *Vict. c.* 96.: to constitute a bar, the plea must not only shew that the debt was contracted before the filing of the petition, but also that it was inserted in the schedule.

THIS was an action of debt. The first count was upon a bill of exchange for 22*l.* 4*s.* 6*d.*, dated the 20th of *September*, 1845, and payable three months after date.

The defendant pleaded, that, after the accruing of the said several debts and causes of action, and before the commencement of the suit, to wit, on the 27th of *December*, 1845, a petition for the protection of the defendant from process was duly, and according to the form of the statutes in such case made and provided, presented by the defendant to the *Liverpool* district court of bankruptcy; and that thereupon, afterwards, and before the commencement of this suit, to wit, on the 27th of *January*, 1846, a final order for protection and distribution was made, in the matter of the said petition, by *Charles Phillips*, Esq., then being a commissioner of the court of bankruptcy, duly authorised in that behalf, to wit, then being one of the commissioners of the court of bankruptcy authorised to act in the *Liverpool* district; and that the said several debts and causes of action, and every of them, and every part thereof, were contracted before the date of the filing of the said petition in the said district court of bankruptcy, —verification.

To this plea the plaintiffs replied, that the said petition for the protection of the defendant from process in the said first plea mentioned, was presented, and the said final order therein also mentioned, was made, after, and not before, the passing of an act of parliament made and passed in a session of parliament held in the

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seventh and eighth years of the reign of Her present Majesty, intituled "An Act to amend the law of insolvency, bankruptcy, and execution,"—verification.

General demurrer, and joinder.

Hugh Hill, in support of the demurrer. The question is, whether a plea in the form here pleaded, is, since the passing of the 7 & 8 *Vict. c.* 96., available as a defence. This court, in *Toomer* v. *Gingell* (*a*), intimated an opinion that it was not: but the court of Exchequer, in a subsequent case of *Platel* v. *Bevill* (*b*), after time taken to consider, held that it was. By the 1st section of the 5 & 6 *Vict. c.* 116., it is provided that any person not being a trader, or, being a trader, owing less than 300*l.*, on giving certain notices, may present a petition to the court of bankruptcy, stating the debts owing by and to him; and that thereupon the judge or commissioner of the court of bankruptcy, may grant him a protection from process against his person and property; and that, upon the presentation of such petition, all the estate and effects of the petitioner shall vest in the official assignee. The 4th section provides for the examination of the petitioner by the commissioner; and enacts, that, if the commissioner is satisfied with the allegations in the petition and schedule, and that the debts were not contracted by fraud, &c., he may make a final order "*for the protection of the person of the petitioner* from all process, and *for the vesting of his estate* in an official assignee," &c. The 7th section enacts, that, from and after the passing of the final order, the whole estate, present and future, as well real as personal, &c., of the petitioner, shall become absolutely vested in the official assignee and assignee chosen by the creditors, without any deed or

(*a*) *Antè*, Vol. III. p. 322. (*b*) 2 *Exch.* 511. 517.

conveyance, and that the assignees shall hold the same as fully as if the petitioner had been made a bankrupt, and they had been assignees under his *fiat*. The 9th section enacts, that the assignees shall be entitled to claim and demand from the petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made; and that all such estate and effects, of what kind soever, and wheresoever situate, shall be absolutely vested in such assignees, upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition; and that they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order thereinbefore provided: provided always that no assignee of any insolvent shall be authorised by virtue of that act to take possession of any estate or effects which the insolvent shall have acquired or become possessed of after the making of the final order therein mentioned, except under the authority of an order of the said commissioner, or of the court of review in bankruptcy, made for that purpose, and then only to the extent and at the time and in manner directed by such order. Then, the 10th section, which gives the form of plea, enacts, "that, if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorised, — whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." Then comes the 7 & 8 *Vict. c.* 96., the 1st section of which, reciting the expediency of amending the former act, enacts "that a petition for

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protection from process *under the said act*, may be presented to any court or district court of bankruptcy within the district of which the petitioner shall have resided twelve calendar months, without any notice whatever being given to any creditor, or in the *London* gazette, or any newspaper." The 2nd section gives the form of the petition. The 3rd provides for the notices to be given to creditors, the examination of the petitioner, and the choice of assignees. The 4th section enacts that "the *property* of the petitioner shall, for the purposes of the said recited act and of this act, vest in the assignee or assignees for the time being, by virtue of the appointment of such assignee or assignees." For the meaning of the word "property," reference must be had to the 73rd section, which enacts, "that, in construing this act, the word 'property' shall mean and include all the real and personal estate and effects of the petitioner within this realm and abroad (except the wearing apparel, and such other articles, of the value in that behalf aforesaid, as may by this act be excepted from the operation of the said recited act and this act), and all the future estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects within this realm or abroad, which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained the final order, and all debts due or to be due to such petitioner before he shall have obtained such final order." The 5th section provides, that, upon the petition being filed, the commissioner shall have the like power for seizure of the property of the petitioner, and examination of him and of other persons, as in cases of bankruptcy. Further provisions for the mode of dealing with the property of the petitioner, are contained in the 9th and 10th sections. Then comes the 22nd section, which enacts, "that the

final order to be made under the provisions of the said act, as amended by this act, shall protect the *person* of the petitioner from being taken or detained under any process whatever, in the cases hereinafter mentioned, that is to say, from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same, respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons, not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule," &c. [*Maule*, J. In terms, that is confined to the protection of the *person* of the petitioner.] The question is, whether the 10th section of the former act does not remain in force. The 74th section of the later act expressly enacts "that nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited act, except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with or at variance with the provisions of this act." Reading the two acts as one, there is nothing in the second act which is inconsistent with the 10th section of the first act. [*Maule*, J. If the future property vests by the petition in the assignee, it seems to be a reason why the final order should be a bar.] Some light is thrown upon the subject by the 28th section of the 7 & 8 *Vict. c.* 96., which enacts, "that, if, for any of the causes in that behalf aforesaid, no day be named for making the final order, or if the consideration of such final order be adjourned *sine die*, or such final order be refused, the commissioner shall

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have the power, after the expiration of such time subsequent to the filing of the petition, as, having regard to all the circumstances of the insolvency, and the conduct of the petitioner as an insolvent debtor before and after his insolvency, the commissioner shall think just, and after hearing the petitioner, or any of his creditors, or his or their counsel or attorneys, to make an order to protect the petitioner from being taken or detained under any process whatever for or in respect of the several debts and sums of money due or claimed to be due at the time of filing his petition, from the said petitioner, to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same, respectively, or for which such persons should have given credit to the said petitioner before the time of filing his petition, and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making such order, who may be indorsers (*sic*) or holders of any negotiable security set forth in his said schedule: provided, always, that no debtor shall be imprisoned on any process for more than twelve calendar months, for any debt contracted before filing his petition, in case the final order shall be refused, or shall not be made, or in case the protecting order shall not be renewed."

To constitute a good plea, the form given by the 10th section of the 5 & 6 *Vict. c.* 116. must be strictly pursued, or the plea must go on to allege that all the steps required by the 4th section have been duly taken: *Nicholls* v. *Payne* (*a*); *Gillon* v. *Deare* (*b*); *Wright* v. *Hutchison* (*c*); *Laurie* v. *Bendall.* (*d*) The case of *Toomer* v. *Gingell* (*e*) has been supposed to be at vari—

(*a*) 7 *M. & G.* 927., 8 *Scott, N. R.* 732.
(*b*) *Antè*, Vol. II. p. 309.
(*c*) *Antè*, Vol. IV. p. 569.
(*d*) 12 *Q. B.* 634.
(*e*) *Antè*, Vol. III. p. 322.

ance with the decision of the court of Exchequer in *Jacobs* v. *Hyde* and *Platel* v. *Bevill.* (*a*) But, in *Toomer* v. *Gingell*, the plea was clearly a bad plea: it contained no statement that any assignee had been appointed, or that the creditors had any means whereby to obtain the future property of the insolvent; nor was the general form given by s. 10. followed. In *Miles* v. *Pope*(*b*), a plea alleging that the defendant had obtained a final order *for protection and distribution*, under the 7 & 8 *Vict. c.* 96., was holden not to be proved by the production of a mere order for personal protection, under s. 28. *Rolfe*, B., in delivering the judgment of the court in *Platel* v. *Bevill*, says: "On a careful consideration of the clauses of both acts, we think the intention of the legislature is sufficiently plain, and that there is no difference in the legal effect of the final order given under the second, from that given under the first act, as to the discharge of the insolvent. In both, we are of opinion that it constitutes an absolute bar to the actions in respect of which it is a protection." And, after a minute criticism of the various clauses of the two acts, the learned baron concludes: "Considering the two acts together as one system, we see no reason to suppose that the legislature, which clearly meant to give facilities to the debtor to obtain his discharge, intended also to limit the operation of that discharge under the new act, all his property, present and future, being disposed of for the benefit of creditors in the same way in both acts. We think that the legal effect of the discharge is the same in both acts, and that the effect inartificially described in the 10th section belongs just as much to an order under the second, as under the first act. This view of the two acts differs from that which my Brother *Maule* is reported to have taken in the case of *Toomer*

(*a*) 2 *Exch.* 508. 517. (*b*) *Antè*, Vol. V. p. 294.

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v. *Gingell.* The question in that case was not fully argued, the learned counsel for the defendant having, after taking time, acted upon the impression, as to the meaning of the second act, which its language is, at first sight, so likely to create, and abandoned the argument. Upon the best consideration we can give to these acts, we think that the impression was a wrong one, and that the effect of the final order is the same under both acts." The point was again argued in the court, in *Nash* v. *Brown* (*a*); but the court gave no opinion upon it, the judgment ultimately proceeding upon the ground that it sufficiently appeared that the petition and order were under the 5 & 6 *Vict. c.* 116. [*Maule*, J. Under the first act, the order in terms ordered the protection of the person of the petitioner, and the distribution of his estate. Under the second act, we thought,—though we do not seem to have been properly understood,—that the vesting, if assumed to take place, will entitle the party to his discharge. I do not gather from the case of *Platel* v. *Bevill*, that the court of Exchequer intimate an opinion that an order of discharge under the 7 & 8 *Vict. c.* 96., without an allegation of the appointment of an assignee, would be a bar.] No. [*Maule*, J. This court thought it necessary that the property should vest: the court of Exchequer think so too. In *Toomer* v. *Gingell*, the property did *not* vest: in *Platel* v. *Bevill* it *did*. The court of Exchequer treat that as a difference of opinion.]

Cowling, contrà. The 10th section of the 5 & 6 *Vict. c.* 116. is impliedly repealed by the subsequent inconsistent provisions of the 7 & 8 *Vict. c.* 96.,—to such an extent, at all events, as to make this a bad plea. The

(*a*) *Antè*, Vol. VI. p. 584.

5 & 6 *Vict. c.* 116. was passed at a time when imprisonment for debt was thought to have been carried too far: this sufficiently appears from the recital, which declares it to be "expedient to protect from all process against the person, such persons as have become indebted without any fraud or gross or culpable negligence, so as, nevertheless, their estates may be duly distributed among their creditors." Under the former acts, 7 *G.* 4. *c.* 57. and 1 & 2 *Vict. c.* 110., it was necessary that the party availing himself of the benefit of those acts, should, at the time of petitioning, be in actual custody. In dispensing with that condition, the legislature seems to have intended to confine the boon to those petitioners whose conduct had been honest and *bonâ fide.* The petition must have annexed to it a full and true disclosure of the petitioner's debts and property; and, upon the filing of the petition, all the estate and effects of the petitioner forthwith become vested in the official assignee. By section 4. the commissioner is to examine the petitioner upon oath; and, if satisfied that the allegations in the petition, and the matters in the schedule, are true, and that the debts have not been contracted by fraud or breach of trust, &c., he is to make an order,—"which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee," &c. Section 7. enacts, that, from and after the final order, the whole estate, present and future, shall become absolutely vested in the official assignee and creditors' assignee. Then the 10th section enacts, "that, if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly

authorised, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." There the final order is *called* an order for *protection and distribution.* So that the final order is for three purposes,—first, for protecting the person of the petitioner from all process,—secondly, for vesting his estate in the assignees,—thirdly, for distribution of his estate among his creditors. Without the 7th and 10th sections, the estate would not have vested, and the petitioner would have had no protection. There was no provision in the act for *distribution*: the act, therefore, became a dead letter: "its effect was, to take the property out of the hands of the debtor, and place it in the insolvent court, where it remained without any power on the part of the creditors to take it out." (*a*) The 7th section shews how the estate is to vest: it enacts, "that, from and after the passing of the final order, the whole estate, present and future, as well real as personal, and as well in the colonies as in the united kingdom, all the effects, and all the credits of the petitioner, shall become absolutely vested in the official assignee and the assignee chosen by the creditors, without any deed or conveyance; which assignees shall hold the same as fully as if the petitioner had been made a bankrupt, and they had been assignees under his *fiat*," &c. [*Maule*, J. Do not that make the assignees trustees for the creditor Possibly it might, in equity. But for the 10th tion, the final order would give no protection. consequence of the present and *future* property petitioner vesting in the assignees, by s. 7., wa the party was reduced to a state of pauperism legislature, therefore, went further than they i by exposing him to imprisonment for life,—w

(*a*) *Per* Lord *Cottenham*, *in Dom. Proc.* See *Debates*, Vol. 76, p. 1394.

evidently contrary to the spirit in which the earlier provisions of the statute were conceived. The 10th section is not confined to creditors whose debts are scheduled, but applies to all who were creditors before the date of filing the petition. Under the former acts, 7 *G.* 4. *c.* 57. *ss.* 46. 61., and 1 & 2 *Vict. c.* 110. *ss.* 75. 91.,—the insolvent could only plead his discharge in bar against scheduled creditors. [*Cresswell*, J. The commissioner has power, under s. 4., to determine whether or not the condition of filing a faithful schedule, has been fulfilled. *Maule*, J. The 12th section seems to have been designed to remedy the inconvenience to which you allude.] It does so, but in a very imperfect manner, by enabling the commissioner,—if he sees reason to believe that the petitioner had not, before the making of the order sought to be rescinded, made a full disclosure of his estate, effects, and debts, or had, since the making of such order, not given notice to the assignees, of any property after acquired by him,—to rescind the final order, so far as it relates to the protection of the petitioner's person from process, and as far as relates to the effect of such order in bar of suits and actions. [*Williams*, J. If all the protection the petitioner gets is derived from the 10th section, though it enables him to plead in bar the final order, he could not reply it to a plea of set-off.] That is an additional difficulty.

The 7 & 8 *Vict. c.* 96. was passed to remedy these defects in the former act. It had the same objects in view, and has carried them out more correctly. The 1st section dispenses with notice. The 2nd section provides the form of petition, and requires the petition and schedule to be verified by affidavit. By s. 4. the property of the petitioner is vested in the assignees. The final order, under s. 22., is an order for the *protection of the person only*, "from all process in respect

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of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons, not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule." [*Maule*, J. This you say altogether puts an end to s. 10. of the 5 & 6 *Vict. c.* 116.?] Yes: and it limits the protection *to* creditors whose debts are mentioned in the schedule. [*Maule*, J. May not the 22nd section of the 7 & 8 *Vict. c.* 96. consistently stand with ss. 7. and 10. of the 5 & 6 *Vict. c.* 116.? Section 22. contains no negative words.] It is laid down by *Eyres*, J. (*a*), in *Harcourt* v. *Fox* (*b*), that "statutes introductive of a new law, penned in the affirmative, do always repeal former statutes concerning the same matter, as implying a negative." After the passing of the second act, there can no longer be a final order for protection and *distribution;* and the protection is limited to such creditors as are named in the schedule, and to the *person* of the petitioner. The 73rd section of the 7 & 8 *Vict. c.* 96. shews what "property" of the petitioner vests under s. 4. in the assignees: it enacts, that, "in construing this act, the word 'property' shall mean and include all the real and personal estate and effects of the petitioner within this realm and abroad (except the wearing apparel, and such other articles of the value in that behalf aforesaid as may by this act be excepted

(*a*) *Samuel Eyres*, Just. of K. B.

(*b*) 1 *Show.* 506. 520. And see *Townsend's* case, *Plowd.* 113.; *Jenk. Cent.* 89.; *Wethwen* v. *Baldwin*, 1 *Siderf.* 55.; *post*, 478 (*b*).

from the operation of the said recited act and this act), and all the future estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects within this realm or abroad, which such petitioner may purchase, or which may revert, descend, be devised or bequeathed, or come to him *before he shall have obtained the final order*, and all debts due or to be due to such petitioner before he shall have obtained such final order." [*Maule*, J. There is no doubt that the 7 & 8 *Vict. c.* 96. applies to a limited futurity.] *Nicholls* v. *Payne*, *Gillon* v. *Deare*, and *Wright* v. *Hutchison*, proceeded upon the 5 & 6 *Vict. c.* 116. *Miles* v. *Pope* has no bearing whatever on the question. And, with respect to *Toomer* v. *Gingell*, the point for argument there was, — "that the plea afforded no answer to the action, the order therein set forth only protecting the person of the defendant from arrest or detention for the debts therein specified, and being no bar to an action for the recovery of them." The plea shewed an order in the form given by the 7 & 8 *Vict. c.* 96., but not an order for distribution. The case was not decided, — as is suggested, — on the point of pleading. [*Maule*, J. The court in that case intimate an opinion that the construction you are now contending for is the true one.] Yes. In the argument in *Jacobs* v. *Hyde*(*a*), it is suggested that "the 22nd section of the 7 & 8 *Vict. c.* 96. is substituted for the 4th section of the 5 & 6 *Vict. c.* 116., leaving the 10th section of the previous act unaffected by its provisions." The 22nd section of the later act, however, it is submitted, is substituted for the 10th section of the former act, — or, rather, for both the 4th and the 10th sections. [*Maule*, J. If the protection given by s. 4. is taken away, and something is substituted for it,

(*a*) 2 *Exch.* 510.

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and s. 10. gives a defence in the one case and not i the other, s. 10. of course falls; for, when a thin *cannot* be done, *the mode of doing it* is not material. There is nothing in the judgment of the court Exchequer in *Platel* v. *Bevill* that necessarily she this plea to be a good one.

Hugh Hill, in reply. The question is whether the 10th section of the 5 & 6 *Vict. c.* 116. is impliedly repealed by the 7 & 8 *Vict. c.* 96. By s. 4. of the former act, the final order is declared to be "for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in the assignee:" and s. 7. enacts, that, from and after the passing of the final order, the whole estate, *present and future*, shall become absolutely vested in the official assignee, without any deed or conveyance. Under this section, the property which passes to the assignees, must be property which is capable of vesting,—such an interest as could be conveyed by deed, and which would presently vest: it must be something actually or potentially in the possession of the petitioner at the time: *Lunn* v. *Thornton.* (*a*) The 9th section shews that this is the meaning of s. 7.: it enacts "that the said assignees shall be entitled to claim and demand from the said petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made; and all such estate and effects, of what kind soever, and wheresoever situate, shall be absolutely vested in such assignees, upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition, and they shall hold the same in like manner

(*a*) *Antè*, Vol. I. p. 379.

conveyance, and that the assignees shall hold the same as fully as if the petitioner had been made a bankrupt, and they had been assignees under his *fiat*. The 9th section enacts, that the assignees shall be entitled to claim and demand from the petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made; and that all such estate and effects, of what kind soever, and wheresoever situate, shall be absolutely vested in such assignees, upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition; and that they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order thereinbefore provided: provided always that no assignee of any insolvent shall be authorised by virtue of that act to take possession of any estate or effects which the insolvent shall have acquired or become possessed of after the making of the final order therein mentioned, except under the authority of an order of the said commissioner, or of the court of review in bankruptcy, made for that purpose, and then only to the extent and at the time and in manner directed by such order. Then, the 10th section, which gives the form of plea, enacts, "that, if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorised, — whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." Then comes the 7 & 8 *Vict. c.* 96., the 1st section of which, reciting the expediency of amending the former act, enacts "that a petition for

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that the debt was scheduled?] Yes. [*Maule*, J. But you say that that does not apply, where the party avails himself of the form given by the 10th section?] Precisely so. If the debt is not in the schedule, that omission should come by way of replication.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This demurrer was argued before us, with much ingenuity, during the last term. In support of the demurrer, it was contended, that, although the alleged order for protection and distribution mentioned in the plea, was made after the passing of the 7 & 8 *Vict. c.* 96., that plea is still a good and sufficient plea in bar, by virtue of the 10th section of the former act, the 5 & 6 *Vict. c.* 116.

By the 1st section of that act, certain persons were enabled to present a petition to the court of bankruptcy, for protection from process, and the court, or any commissioner to whom any such petition was referred, might give an interim order for protection against all process whatever, either against the person or property of the petitioner. By section 4. the commissioner was authorised, on being satisfied of certain matters, to grant an order, "which shall be called a *final order*, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an assignee to be named by such commissioner, together with an assignee to be chosen by the creditors," — as therein mentioned. By the 5th section, the commissioner was impowered to renew the interim order, from time to time, until "the final order for *protection and distribution*." This plainly refers to the final order mentioned in the preceding section, and therefore gives to the order for protecting

final order to be made under the provisions of the said act, as amended by this act, shall protect the *person* of the petitioner from being taken or detained under any process whatever, in the cases hereinafter mentioned, that is to say, from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same, respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons, not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule," &c. [*Maule*, J. In terms, that is confined to the protection of the *person* of the petitioner.] The question is, whether the 10th section of the former act does not remain in force. The 74th section of the later act expressly enacts "that nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited act, except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with or at variance with the provisions of this act." Reading the two acts as one, there is nothing in the second act which is inconsistent with the 10th section of the first act. [*Maule*, J. If the future property vests by the petition in the assignee, it seems to be a reason why the final order should be a bar.] Some light is thrown upon the subject by the 28th section of the 7 & 8 *Vict. c.* 96., which enacts, "that, if, for any of the causes in that behalf aforesaid, no day be named for making the final order, or if the consideration of such final order be adjourned *sine die*, or such final order be refused, the commissioner shall

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but the 74th section enacts "that nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited act, except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with, or at variance with, the provisions of this act."

Now, the 10th section of the former act is not expressly repealed; and the question is, whether it is inconsistent with, or at variance with, the provisions of this latter act. In order to determine this, we must inquire what was the nature of the order made under the former statute, and which the 10th section allowed to be pleaded in bar.

By the 4th section, it appears that it was a final order for protection of the petitioner against *all process*, and for vesting his estate in the assignees; which final order is, by the 5th section, named "an order for protection and distribution." *This order* is, by the 10th section, allowed to be pleaded in bar, in all actions brought for or in respect of a debt contracted before the date or filing of the petition. The 4th section is not expressly repealed by the subsequent act, but is inconsistent with the 22nd section of it, whereby it was enacted that the final order to be made under the provisions of the said act, as amended by this act, shall protect the person of the petitioner from being taken or detained under any process whatever, in the cases hereinafter mentioned (that is to say), "from all process in respect of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as" &c., limiting its operation to persons and claims named in the schedule. This is inconsistent with the 4th section of the former act, which applied generally to all debts contracted

before the filing of the petition and; therefore so far repeals it.

Upon the same principle, it appears to us, that, if the 10th section of the former act is to be imported into the 7 & 8 *Vict. c.* 96., it must be with the qualification that the final order shall only be a bar to actions brought in respect of debts or claims mentioned in the schedule; for, to allow it as a bar in other cases, would be inconsistent with the latter act.

This was not much disputed at the bar: but it was contended, that the plea might still be pleaded in the form before given; and that, if the debt was not in the schedule, that should be replied: and the case of *Platel v. Bevill* (*a*) was cited as an authority to that effect: and so it is; but the question principally considered in that case, was, whether a final order obtained under the 7 & 8 *Vict. c.* 96., constitutes an absolute bar to an action for the debts as to which it is a protection, or operates only as a protection of the person of the insolvent. The court of Exchequer decided that it is an absolute bar: and, after hearing a very able argument on that question, we are disposed to agree with that opinion, but abstain from binding ourselves by a decision on the point, inasmuch as it appears to us, that, assuming the final order to be an absolute bar in all cases where it is a protection at all, still the plea is bad. In *Platel* v. *Bevill*, the attention of the court does not appear to have been drawn to the limited operation of the final order made under the 7 & 8 *Vict. c.* 96., *viz.* that it applies only to debts in the schedule, and not to all debts contracted before the filing of the petition.

In framing a plea in bar under the 10th section of the 5 & 6 *Vict. c.* 116., it was necessary to allege that the debt sued for accrued before the filing of the

(*a*) 2 *Exch.* 511.

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petition, to shew that it was a matter upon which the final order might operate; although the general form of plea sanctioned by the 10th section, made it unnecessary to set out the proceedings before the commissioner, it being the intention of the legislature that matter decided by the commissioner should not be again disputed, — as was said by *Tindal*, C. J., in *Cook* v. *Henson*. (*a*) Upon the same principle, we think, that, in order to make a plea in bar good under the 10*th* section of the 5 & 6 *Vict. c.* 116., construed with regard to the 7 & 8 *Vict. c.* 96., it should allege, not only that the debt accrued before the filing of the petition, but that it was named in the schedule.

For want of such an averment, it appears to us that this plea is bad, and that our judgment must be for the plaintiff.

But, considering the doubtful nature of the question that is argued, we think it right to offer the defendant leave to amend his plea, on the usual terms.

Judgment accordingly.(*b*)

(*a*) *Antè*, Vol. I. p. 908., 3 *D. & L.* 177.

(*b*) A *special* statute does not derogate from a *special* statute, without express words of derogation. *Jenk. Cent.* 198., case xi. I am seised of the manor of *Dale*, and, by an act of parliament, the manor is given to *J. S.* in fee, with a proviso that all rights of strangers be saved: *Per Brooke* (Serjeant): This act is void, by reason of the "contrariosity" of the proviso. And *Guy Palmes* (Serjeant) held (*first*) the case clear, that the act is good, and the proviso void. Which was affirmed by others. I did *quære*. *M.* 7 *H.* 8, *Keilwey*, 174, pl. 4. And see *Walsingham's* case, *Plowd.* 563.; *Englefield's* case, *F. Moore*, 309., 1 *Co. Rep.* 46, 47.; Dr. *Foster's* case, 11 *Co. Rep.* 56. 62, 63.; *Owen* v. *Saunders*, 1 *Ld. Raym.* 158. 160. See also *F. N. B.*, 208. *H.* I., as to the conflict between the statute of *Westm.* II., stat. 1. *c.* 21., and the statute of *Westm.* II., stat. 1. c. 1. (the statute *De Donis*) passed in the same session.

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Feb. 25.

The plaintiff declared against the defendant for an alleged infringement of a patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." The defendant pleaded, — fourthly, that the plaintiff did not particularly describe his invention, and in what manner the same was to be performed, &c., — sixthly, that the invention described in the specification, was a different invention from that for which the letters-patent were granted, by reason whereof the letters-patent were void. At the trial, the plaintiff put in a specification, the title of which described the invention to be of "improvements in the manufacture of gas for illumination, and in the apparatus used *therein and* when transmitting and measuring gas;" and which stated it to relate,— "first, to a mode of manufacturing gas for the purpose of illumination, — secondly, to improvements in setting and heating clay retorts for making coal-gas, — thirdly, *to a mode of manufacturing clay retorts*, —fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the consumer:" —

Held that there was a material variance between the invention specified, and that described in the title of letters-patent; and, consequently, that the letters-patent were void; and that the objection was available under either the fourth or the sixth plea.

THIS was an action upon the case for the infringement of a patent.

The declaration stated that the plaintiff and one *William Richards*, before and at the time of the making of the letters-patent, and of the committing of the grievances by the defendant as thereinafter mentioned, were the true and first inventors of certain "improvements in the manufacture of gas for the purpose of illumination, and in apparatus used when transmitting and measuring gas:" it then proceeded to allege the grant to them of letters-patent, dated the 7th of *March*, 1844, subject to the usual condition for the inrolment of a specification within six calendar months; and averred that such specification was duly inrolled on the 7th of *September*, 1844: Breach, that the defendant, well knowing the premises, but contriving, and wrongfully intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages which he

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might and otherwise would have derived and acquired from the making, using, exercising, and vending of the said invention, after the making of the said letters-patent, and within the term of years in the said letters-patent mentioned, to wit, on the 11th of *September*, 1845, and on divers other days and times between that day and the commencement of the suit, and within that part of the united kingdom of *Great Britain* and *Ireland* called *England*, unlawfully and unjustly, without the leave or licence, and against the will of the plaintiff and the said *William Richards*, or either of them, made and sold divers, to wit, one thousand apparatus to be used for transmitting and measuring gas, with certain improvements in the construction thereof, which said improvements were intended to, and did, imitate and resemble the said improvements in the said letters-patent so invented by the plaintiff and the said *William Richards* as aforesaid, in breach of the said [illegible] apparatus, and against the privilege so granted to the [illegible] plaintiff and the said *William Richards* and their assign[illegible] as aforesaid; whereby the plaintiff had been and wa[illegible] greatly injured, &c.

The defendant pleaded, amongst other pleas, — secondly, *non concessit*; — fourthly, that the plaint[illegible] and the said *William Richards* did not, nor did eith[illegible] of them, particularly describe and ascertain the nat[illegible] of their said invention, and in what manner the sa[illegible] was to be performed, in manner and form as [illegible] plaintiff had above in that behalf alleged, conclud[illegible] to the country; — sixthly, that the invention in the said instrument in writing particularly described and ascertained, was not the invention for which the said letters-patent were granted, but another and a different invention; and that, by reason thereof, the said letters-patent, and the rights, liberties, privileges, benefits, monopolies, and advantages in and by the said letters-

patent granted, and the prohibitions therein contained, before and at the said several times when &c. were, and still remained, wholly void and of no effect, and the same were and continued wholly lost to the plaintiff; wherefore the defendant, at the said several times when &c. in the declaration mentioned, committed the said several grievances in the declaration mentioned, as he lawfully might for the cause aforesaid; verification; — seventhly, that, before the making of the letters-patent, the plaintiff and *Richards*, by their petition in the said letters-patent mentioned, represented to the crown that the said invention was of, amongst other things, improvements in the manufacture of gas for the purpose of illumination; whereas, the said representation was false, and the said invention was not an invention of any improvement in the manufacture of gas for the purpose of illumination; whereby the crown had been deceived in the grant, &c., verification.

The plaintiff by his replication traversed the sixth and seventh pleas, and joined issue upon the others.

The cause was tried before *Wilde*, C. J., at the sittings in *London* after *Trinity* term, 1847. The letters-patent, which were put in, corresponded with the claim as disclosed in the declaration. But the specification, which was also put in by the plaintiff, recited the grant of a patent with a somewhat different title, — stating it to be for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used *therein and* when transmitting and measuring gas." The invention was described as relating, — "first, to a mode of manufacturing gas for the purpose of illumination, — secondly, to improvements in setting and heating clay retorts for making coal-gas, — thirdly, to a mode of manufacturing clay retorts, — and fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the

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consumer." Reference was then made to the drawings annexed to the specification, and the specification proceeded to describe the nature and the mode of performing each of those four heads of claim.

On the part of the defendant, it was submitted that the specification shewed an invention different from that for which the patent was granted, inasmuch as it claimed, in addition to the improvements in the manufacture and measuring of gas, the making of clay retorts.

For the plaintiff, it was insisted, that the substantial object of the specification was, improvements in the manufacture of gas, and in the apparatus for transmitting and measuring it; and that the making of clay retorts was only subservient to the manufacture of gas.

The learned judge inclined to think the objection fatal; and a verdict was entered for the defendant on the fourth, sixth, and seventh issues, the jury being discharged from finding any verdict upon the other issues, and leave being reserved to the plaintiff to move to enter the verdict for him upon all or any of the issues so found for the defendant, with 40*s.* damages, if the court should be of opinion that the specification produced sustained the patent. It was also agreed that the lord chief justice should be considered as having given such direction as the court upon the argument should think he ought to have given, and that the party against whom the decision might be given, should be considered as having tendered a bill of exceptions to such direction, in order to obtain the opinion of a court of error.

Channell, Serjt., in the following *Michaelmas* term, obtained a rule nisi accordingly. He submitted,—first, that the specification, taken altogether, did not claim anything beyond what the letters-patent entitled

tentees to,—secondly, that, if it did claim some-
more, the matter so claimed was so entirely
:t from and independent of the real subject of the
ff's claim, that it might be rejected as surplusage,
d not vitiate the patent,—thirdly, that the fourth,
and seventh pleas were not properly framed to
he objection.

es, Serjt., *Webster*, and *Duncan*, shewed cause, in
r term, 1849. The title of the letters-patent
es two-heads of claim, *viz.* "improvements in the
acture of gas," and "improvements in apparatus
hen transmitting and measuring gas." The in-
n recited in the specification is of something
different: it is of "improvements in the manu-
: of gas for the purpose of illumination, and in
paratus used *therein and* when transmitting and
ring gas,"—clearly involving a claim for improve-
in the apparatus used in the manufacture of gas.
lear that the objection is one which must prevail,
erly taken. The allegation of the inrolment of
ification is a material one: if the specification
; be read, the plaintiff does not support his decla-
: *Walton* v. *Potter* (*a*); *Muntz* v. *Foster*. (*b*)
is no pretence for saying that the improved
of making clay retorts,—by hydraulic or other
re,—is an improvement in apparatus for "trans-
g and measuring" gas: the claim is clearly refer-
ly to apparatus to be used in the manufacture of
nd, if so, it is a claim which is not within the
. In *The King* v. *Wheeler* (*c*), a patent had been
d for "a new or improved method of drying and
ing malt:" in the specification it was stated that

3 *M.* & G. 411., 4 *Scott*, 91.

(*b*) 6 *M.* & *G.* 734., 7 *Scott*, *N. R.* 471., 1 *D.* & *L.* 737.

(*c*) 2 *B.* & *Ald.* 345.

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the invention consisted in exposing malt, previously made, to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process, nor the utmost degree of heat which might be safely used, nor the length of time to be employed, nor the exact criterion by which it might be known when the process was accomplished: and it was held that the patent was void — first, because the specification was not sufficiently precise,—secondly, because the patent appeared to be for a different thing from that mentioned in the specification. [*Maule*, J. Does every excess of claim vitiate a patent?] Yes, unless amended under the provisions of Lord *Brougham*'s act, 5 & 6 *W.* 4. *c.* 83. *s.* 1. This defence is available under *non concessit*, which, as *Tindal*, C. J., observes, in *Bedells* v. *Massey* (*a*), is the only way in which the defendant can raise the question whether that which the plaintiff claims is within the grant. [*Maule*, J. Suppose there was no specification at all inrolled,—could you shew that under *non concessit*?] No. In *Bunnett* v. *Smith* (*b*), upon a motion for leave to plead *non concessit*, amongst other pleas, *Pollock*, C. B., inquires — "What is the object of pleading the plea?" Upon which Mr. *Hindmarch* replies — "It is the proper form of pleading, so as to enable the defendant to object that the title in the patent does not correctly describe the invention." And *Parke*, B., adds, — "Yes, that is so." In *Hill* v. *Thompson* (*c*), Lord *Eldon* says: "In his directions to the jury, the judge has stated it as the law on the sub-

(*a*) 7 *M.* & *G.* 630., 8 *Scott, N. R.* 337., 2 *D.* & *L.* 322.

(*b*) 13 *M.* & *W.* 552., 2 *D.* & *L.* 380.

(*c*) 3 *Meriv.* 629., 1 *Webster's Patent Cases*, 237.

ject of patents,—first, that the invention must be novel,—secondly, that it must be useful,—and, thirdly, that the specification must be intelligible. I will go further, and say, that not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery, and of useful discovery, is the only proper subject for the protection of a patent. And I am compelled to add, that, if a patentee seeks by his specification any more than he is strictly entitled to, his patent is thereby rendered ineffectual, even to the extent to which he would be otherwise fairly entitled. On the other hand, there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials. If there be a patent both for a machine, and for an improvement in the use of it, and it cannot be supported for the machine, although it might for the improvement merely, it is good for nothing altogether, on account of its attempting to cover too much." At all events, the objection is sustainable under the sixth plea, which states that the invention specified is not that for which the patent was granted. There is no case in which it has been held that any part of the claim can be rejected as surplusage. Lord *Lyndhurst*, in *Sturz* v. *De la Rue*(*a*), says, that, "the description in the patent must unquestionably give some idea, and, so far as it goes, a *true* idea, of the alleged invention, though the specification may be brought in aid to explain it."

(*a*) *5 Russ. 324.*

Channell, Serjt., in support of the rule. In *Morga*[redacted] v. *Seaward* (*a*) *Parke*, B., in delivering the judgment [redacted] of the court, says: "That a false suggestion of th[redacted] grantee avoids an ordinary grant of lands or tenemen[redacted] from the crown, is a maxim of the common law: a[redacted] such a grant is void, not against the crown merely, b[redacted] in a suit against a third person: *Travell* v. *Carteret* (*b*); *Alcock* v. *Cooke*. (*c*) It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill* v. *Thompson* (*d*) and *Brunton* v. *Hawkes* (*e*); for, although the statute invalidates a patent for want of novelty, and consequently, by force of the statute, the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is, that the consideration for the grant is novelty of all, and, the consideration failing, the crown being deceived in its grant, the patent is void, and no action maintainable upon it." In *Nickels* v. *Haslam* (*g*) letters-patent were obtained for *improvements* in the manufacture of a certain article: the specification described a *single* improvement in the mode of manufacturing that article: and it was held that this was not an inconsistency invalidating the patent. *Tindal*, C. J. there says: "The objection raised by this plea resolves itself into something like that which was taken in a case which we had in the Exchequer Chamber last term. In that case,—*Cook* v. *Pearce* (*h*),—it was held, that an objection cannot be taken to the title of a patent, unless some fraud upon the crown, or detriment

(*a*) 2 *M.* & *W.* 544., 1 *Webster's Patent Cases*, 187.
(*b*) 3 *Lev.* 134.
(*c*) 5 *Bingh.* 340., 2 *M.* & *P.* 625.
(*d*) 8 *Taunt*, 375., 2 *J. B. Moore*, 424.
(*e*) 4 *B.* & *Ald.* 541.
(*g*) 7 *M.* & *G.* 378., 8 *Scott, N. R.* 97.
(*h*) 13 *Law Journ.*, *N. S.*, *Q. B.* 189.

to the public, can be shewn. Here, the objection is only to the title, as describing the patent to have been granted for *improvements* in a certain manufacture, whereas the specification discloses only *one* improvement. This is certainly a most subtle objection: if the term improvement had been used, it would have been *nomen collectivum*, and would have covered any number of improvements. I cannot see why the variance, if it be one, should vitiate the patent, the objection being merely to the title of the patent, without fraud upon the crown or detriment to the public." The question here is, what is the fair meaning of the first branch of the plaintiffs' claim. They were bound to shew some sort of improvement in the mode of manufacturing gas for the purpose of illumination. They do not claim the making of retorts; but merely the use of clay retorts made upon the principle described in the specification, as ancillary to the improved manufacture of gas. [*Maule*, J. Then they ought to have claimed the *using*, and not the *making* of them. The specification in effect describes the claim to consist of two things,—first, the manufacture of gas, with improvements in setting and heating clay retorts,—secondly, the *making* the retorts. Would the making of clay retorts in the mode described, for the purpose of being used in the manufacture of gas, be an infringement of this patent?] It is submitted that it would not. The making of the retorts is not claimed, but merely the use of them as subservient to the improved manufacture of that which was the real subject-matter of the patent. The patentees were bound to describe the retorts in their specification, as a mode of producing the improved result: see *Clegg*'s Patent. (*a*)

The next question is, whether the patent is defeated

(*a*) 1 *Webster's Patent Cases*, 103.

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by the introduction of the matter which comprises the third head of claim in the specification: and that depends upon whether or not there is any plea upon the record adapted to raise the objection. *Boulton* v. *Bull* (a) is an authority to shew that this part of the specification may, if necessary, be rejected as surplusage. There, a patent was granted to *A. B.* for a *new invented method* of using an old engine in a more beneficial manner than was before known. The specification stated that the *method* consisted of certain *principles*, and described the mode of applying those principles to the purposes of the invention; and an act of parliament, reciting the patent to have been for the making and mending of *certain engines* by him invented, extended to *A. B.* for a longer term than fourteen years the privilege of *making, constructing,* and selling the *said engines*. This court was divided in opinion as to whether or not the patent was valid. The case afterwards came before the court of Queen's Bench, on error,—*Hornblower* v. *Boulton* (b),—where it was unanimously resolved that the invention was the subject of a patent, and the patentee's right valid. *Eyre*, C. J., in delivering his opinion in the court below, says (c): "Some weighty observations have been made upon parts of this specification, but those parts appear to me not properly to relate to the method described in the patent: they are rather intimations of new methods of improvement in fire-engines, and some of them, I am ready to confess, either very loosely described, or not very accurately conceived. I do not undertake to pronounce which, but one or the other is pretty clear. They are the fourth and fifth articles: the first, second, third, and sixth appear to me to belong to this method, and very

(a) 2 *H. Blac.* 463.
(b) 8 *T. R.* 95.
(c) 2 *H. Blac.* 498.

clearly to point out and explain the method to any man who has a common acquaintance with the subject, and to be intelligible even to those who are unacquainted with it. If there be a specification to be found in that paper, which goes to the subject of the invention as described in the patent, I think the rest may very well be rejected as surplusage." The defence suggested here clearly is not raised upon *non concessit*, which merely traverses the grant by the Queen of a patent for these improvements. The fourth plea has generally been supposed to put in issue whether or not the instructions given by the patentee in his specification are sufficient to enable a workman of competent skill to practise the invention. That plea, therefore, cannot avail the defendant. In *Neilson* v. *Harford* (*a*), where there was a similar plea, Lord *Abinger*, in the course of the argument, says (*b*): "If the specification is consistent with the title, that would be sufficient." In *Derosne* v. *Fairie* (*c*), it was held that the objection that the title is *larger* than the invention, is not raised by a plea of the insufficiency of the specification. This is the converse of that case; but the principle is the same. The seventh plea sets up fraud by the patentees,—not the non-performance of something that is a condition-precedent. It points to a representation made by the patentees in their petition to the crown: and that clearly does not let in this defence. And, with regard to the sixth plea,—suppose the claim for making clay retorts is not within the title, it is a separate and distinct thing, and may be rejected as surplusage. In the case of an award, excess does not vitiate, where the

(*a*) 8 *M. & W.* 806., 1 *Webster's Patent Cases*, 331.

(*b*) 1 *Webster's Patent Cases*, 900

(*c*) 1 *Webster's Patent Cases*, 154. 158.

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matter which constitutes it is capable of being severed from the rest of the award, and rejected as surplusage.

Cur. adv. vult.

MAULE, J., now delivered the judgment of the court:—

This was a motion for a new trial, in an action upon the case for an infringement of a patent, which was described in the declaration to be "for certain improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." There were several pleas, amongst others, was one,—the sixth,—which stated that the invention described in the specification was a different invention from that for which the letters-patent were granted, and that, by reason thereof, the letters-patent were void. There was likewise a plea of *non concessit.*

At the trial before *Wilde,* C. J., a verdict was found for defendant on the fourth, sixth, and seventh issues, the jury being discharged as to the other issues; and a rule nisi was afterwards obtained, pursuant to leave reserved at the trial, to enter a verdict for the plaintiff on those issues with 40*s.* damages. Upon the argument of that rule, the question mainly turned upon the sufficiency of the specification, regard being had to the pleas I have mentioned.

It appeared that the letters-patent had been granted for the objects mentioned in the declaration. The patent was properly described in the declaration as a patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas." No specification appeared to have been inrolled of any patent with that particular title; but a specification was inrolled, reciting the grant of a patent with a title some-

what similar to that mentioned in the declaration, but with the additional words "therein and" interpolated between "used" and "when,"—so that the specification as inrolled was in its title or introductory part represented as being a specification of an invention "for improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used *therein and* when transmitting and measuring gas." The insertion is slight as to the number of words, but it adds most materially to the meaning of the sentence, and extends substantially the grant of the crown; because the title, as suggested in the specification, represents the patent as being a patent for different kinds of apparatus used for two distinct things, *viz.* the making of gas, and the transmitting and measuring it. The making of gas is a chemical operation, which has now become familiar, and consists in evolving from coal, or other suitable material, ordinarily by means of heat, the gas which is contained therein or capable of being produced therefrom. The improvement of the apparatus used in that process, is described in the specification as one of the objects of the patent. The other object which is mentioned in the title of the specification is, the improvement of apparatus used in "transmitting and measuring gas." The transmission and measuring of gas, as is well known, are performed by sending it through pipes and through a certain instrument called a meter, on its way to the premises of the consumer. The two objects thus referred to are evidently perfectly distinct from and independent of each other,—the manufacture of gas being one thing, and the issuing it for consumption another.

Now, the patent granted, was, a patent "for certain improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used,"—not, "when manufacturing gas," but "when transmitting

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and measuring gas." The title did not profess to comprehend improvements in any apparatus used in making gas. The patentees in representing to the crown the nature of the invention which they had discovered, did not give the crown notice that they claimed the exclusive use of any apparatus for making gas. The title of the patent as described in the specification is one which comprehends as well improvements in apparatus for making gas, as improvements in apparatus used in its transmission and metage. And, when the body of the specification is looked at, one main part of the patentees' claim consists of what may be, and probably is, a new mode of manufacturing clay retorts, — an apparatus used in the manufacture, and not in the transmitting and measuring of gas. Any person reading the specification for the purpose of ascertaining what the patentees claimed as their exclusive right, would see without doubt that a material branch of their claim, and of the patent the specification of which they were professing to inrol, was, an improvement in apparatus used in the manufacture of gas. Now, no patent at all has been granted to them for that: and it appears to us to be difficult to suppose that the inrolling a specification in the terms here used can have been intended as otherwise than an attempt on the part of the grantees to remedy an oversight, and so to alter and enlarge the patent. It seems to us that they have specified for a more extensive and a different patent from that which was granted to them. We therefore think the specification insufficient: and that the objection properly arises on the sixth plea. Probably *non concessit*, or the fourth plea, — which states that the plaintiff and *Richards* did not particularly describe the nature of their invention, and in what manner the same was to be performed, *modo et formâ*, — would equally raise

the defence, if the sixth plea were not enough for the purpose.

Upon the whole we think that the direction of the lord chief justice was substantially correct, and that the defendant is entitled to have the verdict entered for him upon the fourth or the sixth issues, or on both, at his election; and consequently that the rule for entering the verdict for the plaintiff must be discharged. The *postea* will therefore be stayed until the first day of the next term, to give the defendant an opportunity of making his election, and of applying to his lordship to enter the verdict accordingly.

Rule discharged.

BOULTER *v.* PEPLOW.
BOULTER *v.* BROOKE.

Jan. 12.

THESE were actions of debt for money paid, money lent, and money found due upon an account stated. The defendant in each case pleaded nunquam indebitatus; upon which issue was joined.

Boulter v. *Peplow* was tried before *Wilde*, C. J., at the sittings in *London* after *Trinity* term last. It appeared, that, by an agreement bearing date the 11th of *April*, 1846, Messrs *White* and *Gillett* demised to *Boulter*, *Peplow*, and *Brooke*, who were described in

A., *B.*, and *C.*, by an agreement in writing, hired premises of *D.*: the premises so hired were intended to be, and were, used for the purposes of a joint-stock company, of which *A.*, *B.*, and *C.* were at the time of the contract committee-men: rent was for some time paid by the company, but ultimately became in arrear; whereupon *D.* sued *A.*, *B.*, and *C.* upon the agreement: *B.* and *C.* suffered judgment by default, and *D.* recovered the amount of rent and costs against *A.*:—

Held, that *A.* was entitled to sue *B.* and *C.* for contribution; and that his remedy against *B.* was not affected by the circumstance of *B.*'s having ceased to be a member of the committee before the accruing of the rent in respect of which the action was brought.

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the agreement as three of the provisional committee of *The Universal Gas-Light Company*, certain premises situate at No. 11, *Old Jewry Chambers*, in the city of *London*, at the yearly rent of 80*l.*, which *Boulter*, *Peplow*, and *Brooke* thereby agreed to pay. The premises were taken possession of, on behalf of the proposed company, on the 27th of *April*. The deed of settlement of the company was registered on the 29th of *September*, in the same year. *White* and *Gillett* having brought an action against *Boulter*, *Peplow*, and *Brooke*, to recover arrears of rent from *Christmas*, 1846, to *Lady Day*, 1848, *Peplow* and *Brooke* suffered judgment to go by default, and verdict having been obtained against *Boulter*, the amount of the damages and costs was levied upon him; and he brought these actions against *Peplow* and *Brooke* to recover contribution.

On the part of the defendants, it was objected that the actions were not maintainable, inasmuch as *Boulter*, *Peplow*, and *Brooke* were partners in the company for whose use the premises were taken.

To this it was answered, that there was no partnership at the time this contract was entered into, the deed of settlement not having been registered, and no complete company having been formed.

The lord chief justice overruled the objection, reserving leave to the defendant to move to enter a verdict for him, or a nonsuit.

On the part of the defendant, a copy of the registered deed of settlement, dated the 20th of *September*, 1846, was offered in evidence. It was produced by a clerk from the office of the registrar-general of joint-stock companies, but was not stamped. Indorsed upon it, pursuant to the 9 & 10 *Vict. c.* 110. *s.* sched. (B.), was the following certificate:—

"We do hereby certify that the within-wr

deed is the deed of settlement of *The Universal Gas-Light Company*, and that, to the best of our knowledge, the particulars therein contained are correctly set forth.

(Signed) "*John M. Field.*
"*E. Boulter.*

Proof of deed of settlement.

For the plaintiff, it was insisted that the copy was not admissible to prove either the execution or the contents of the deed, but that the original should have been produced, or a certified copy or extract, according to the 7 & 8 *Vict. c.* 110. *s.* 18. (*a*)

The learned judge ruled that the copy was admissible, on the principle established by *Slatterie* v. *Pooley*. (*b*)

It appeared that the deed had been executed by the plaintiff and by *Peplow* and *Brooke;* and, after reciting that there was due to the defendant *Peplow*, as one of the provisional committee, the sum of 574*l.* 4*s.* 6*d.*, for moneys advanced by him towards the formation of the company, for contingent expenses, *rent of offices*, &c., the deed contained the following amongst other clauses,— 1. That the company should be named '*The Universal Gas-Light Company.*' 4. That the business

(*a*) Which enacts "That every person shall be at liberty to inspect the returns, deeds, registers, and indexes which shall be made to or kept by the said registrar of joint stock companies, and that there shall be paid for such inspection such fees as may be appointed by the commissions of Her Majesty's treasury in that behalf, not exceeding 1*s.* for each such inspection; and that any person shall be at liberty to require a copy or extract of any such return or deed, to be certified by the said registrar; and there shall be paid for such certified copy or extract such fee as the commissioners of Her Majesty's treasury may appoint in that behalf, not exceeding 6*d.* for each folio of such copy or extract; and that, in all courts of law and equity, and elsewhere, every such copy or extract so certified shall be received in evidence, without proof of the signature thereto, or of the seal of office affixed thereto."

(*b*) 6 *M. & W.* 664.

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of the company should be conducted at No. 11. (*Jewry Chambers.* 7. That the plaintiff and the (fendants should be three of the directors. 82. Th the directors should provide and maintain offices a other convenient rooms, as they should deem fit, f conducting the business of the company. 152. Th the several parties to the deed did thereby ratify a confirm all acts, deeds, matters, and things which, up that date, had been done, executed, and perform by the then directors of the company, or any of the or by the order and direction of them or any of the in regard to the formation and business of the co pany, the funds and property thereof, or in any w relating thereto.

A verdict having been found for the plainti damages 45*l.* 11*s.*,

Byles, Serjt., in *Michaelmas* term last, pursuant the leave reserved to him at the trial, obtained a ru nisi to enter a verdict for the defendant. He refer to *Sadler* v. *Nixon* (*a*), *Helme* v. *Smith* (*b*), and *Pea son* v. *Skelton* (*c*), and to *Collier* on Partnership. (*d*)

Kinglake, Serjt., and *Pashley,* now shewed cause. (The plaintiff and the two defendants, *Peplow* a *Brooke,* were clearly liable to *White* and *Gillett.* A

(*a*) 5 *B. & Ad.* 936.

(*b*) 7 *Bingh.* 709., 5 *M. & P.* 744.

(*c*) 1 *M. & W.* 504.

(*d*) 2nd edit. p. 188.

Costs of signing judgment.

(*e*) The rules not having been moved within the first four days of *Michaelmas* term, but having been placed in the list of reserved motions, and no notice of that fact having been given to the plaintiff, *Kinglake,* Serjt., objected that the defendants ought not to be hea in support of their rules un the judgments which had be regularly signed had been s aside, and the costs paid.

Maule, J. The defendan must pay the costs.

[See *Lester* v. *Lazaru* 4 *Dowl. P. C.* 444., *Doe* (*Duncan* v. *Edwards,* 7 *Dow P. C.* 547., *Emblin* v. *Dartne* 12 *M. & W.* 830., 1 *D. & L* 1010.]

the time the contract in question was entered into, the company had not been formed: it was not proved that there was any provisional committee: but these three persons, *Boulter*, *Brooke*, and *Peplow*, took upon themselves individually to hire the offices. They clearly had no authority to bind the rest of the committee, if any did exist; *Wyld* v. *Hopkins* (*a*); *Barker* v. *Stead.* (*b*) There is nothing to prevent a co-contractor from bringing an action against those who may be associated with him in an undertaking of this sort. In *Lucas* v. *Beach* (*c*), the plaintiff entered into an express contract with a committee of individuals associated together for the purpose of obtaining an act of parliament for making a turnpike-road, to do certain work for a specified sum: he afterwards caused his name to be inserted in the list of subscribers, for two shares: and it was held that he was not thereby precluded from recovering upon such express contract. A mere preliminary arrangement will not constitute a partnership; as was held in *Fox* v. *Clifton* (*d*), *Fox* v. *Frith* (*e*), and many other cases. Reliance was placed, on the part of the defendant, at the trial, upon *Holmes* v. *Higgins.* (*g*) There, a number of persons, including the plaintiff and the defendant, had associated themselves together for the purpose of obtaining a bill in parliament to make a railway; the defendant acted as chairman; the plaintiff, who was the surveyor, brought an action, for work done by him as such, against the defendant; and it was held, that the action was not maintainable against the partnership, on the ground that the same person could not be both plaintiff and defendant in the same action. [*Cresswell*, J. The decision there is put upon the ground of liability to con-

(*a*) 15 *M. & W.* 517.
(*b*) *Antè*, Vol. III. p. 946.
(*c*) 1 *M. & G.* 417., 1 *Scott, N. R.* 350.
(*d*) 6 *Bingh.* 776., 4 *M. & P.* 676.
(*e*) 10 *M. & W.* 131.
(*g*) 1 *B. & C.* 74., 2 *D. & R.* 196.

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tribution.] There, as in *Wilson* v. Viscount *Curzon* (*a*), there was no express contract between the plaintiff and the defendant, and no duty implied by law to indemnify the plaintiff. *Chadwick* v. *Clarke* (*b*), where *Holmes* v. *Higgins* was referred to, is an authority to shew, that, under circumstances like those of the present case, an action will lie upon an *express* contract. *Edger* v. *Knapp* (*c*) is directly in point. There, four persons who had acted as directors of a proposed railway company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them, on their personal responsibility; and it was held, that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution. [*Cresswell*, J. Suppose the premises had originally been taken upon the credit of the company; and, after a distress for rent, these three persons had jointly entered into an independent contract to pay the amount, and one of them had afterwards paid the whole,— could he not have sued the others for contribution?] Clearly he might. Nothing that was afterwards done here could in any respect vary the nature of the contract of the 11th of *April*, 1846. In *Story* on Partnership (*d*), it is said: "The ground why at law, independent of any special covenant, or any distinct several contract, one partner cannot maintain a suit against the other partners for moneys paid, or advanced, or contributed, or liabilities incurred, on account of the partnership, may be readily explained in a satisfactory manner. In the first place, upon the mere technical principles of the common law, one partner cannot sue the others for a contribution or payment made for a joint partnership liability; for, in such a suit, all the partners, including himself, must be made defendants; and it is clear, upon the acknowledged principles of pleading, at the common

(*a*) 15 *M. & W.* 532.
(*b*) *Antè*, Vol. I. p. 700.
(*c*) 5 *M. & G.* 753., 6 *Scott, N. R.* 707.
(*d*) § 221.

law, that a party cannot at once be a plaintiff and a defendant in the same suit; or, in other words, he cannot sue himself, either alone, or in conjunction with others. But a reason far more satisfactory, because it is in no shape founded upon technical principles, is, that, until all the partnership concerns are ascertained and adjusted, it is impossible to know whether a particular partner be a debtor or a creditor of the firm; for, although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount. Now, a settlement of all the partnership concerns is ordinarily, during the continuance of the partnership, unattainable at law; and, even in equity, it is not ordinarily enforced, except upon a dissolution of the partnership. If one partner could recover against the other partners the whole amount paid by him on account of the partnership, they would immediately have a cross-action against him for the whole amount, or his share thereof; and, if he could recover only their shares thereof, then, in order to ascertain those shares, a full account of all the partnership concerns must be taken, and the partnership itself wound up. This would manifestly be a most serious inconvenience, as well as a change of the original contract, from a joint contract of all the partners, *in solido*, to a several contract, each for his own aliquot part of the final balance due to a particular partner upon a special transaction. And, in cases of this sort, the maxim may justly apply, '*Frustra petis, quod statim alteri reddere cogeris*,' or, as it is sometimes expressed, '*Frustra peterit, quod mox rediturus esset.*'" These reasons do not apply to such a case as the present. In *Fitzherbert's Natura Brevium* (*a*), it is said that "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill *pro indiviso*, and take the profits equally,

(*a*) P. 162 B. C.

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and the mill falleth into decay, and one of them will not repair the mill; now, the other shall have a writ to compel him to be contributory to the reparations. And, if there be three or four co-parceners of lands, and the eldest sister do the suit to the lord of whom the lands are holden, for all the co-parceners, and the others will not allow her their proportion for her charges and losses for the same suit; that co-parcener who did the suit may have this writ of contribution." One of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties: *Cowell* v. *Edwards.* (*a*) Here, the defendant was by the plaintiff's payment relieved from a personal liability. *Maule*, J. And the plaintiff paid the money under legal compulsion, — which is equivalent to request.] Hence, an implied assumpsit arose on the defendant's part to repay his proportion. Most of the authorities upon this subject will be found collected in *Davies* v. *Humphreys* (*b*), and commented on by *Parke*, B., in delivering the judgment of the court. The law does not affect to do complete justice in these cases between the parties: where there are six sureties, three of whom turn out to be insolvent, and one of the three solvent parties pays the whole, it would seem to be but reasonable that the contribution of the other two should be in thirds; but the rule of law is otherwise, and holds each liable only to reimburse his co-surety to the extent of one sixth: *Browne* v. *Lee* (*c*); *Kemp* v. *Finden.* (*d*) Even in the case of a partnership, assumpsit will lie for the balance of an adjusted account: *Foster* v. *Allanson* (*e*); *Moravia* v. *Levy.* (*g*)

(*a*) 2 *Bos. & Pull.* 268.
(*b*) 6 *M. & W.* 153.
(*c*) 6 *B. & C.* 689., 9 *D. & R.* 700.
(*d*) 12 *M. & W.* 421.
(*e*) 2 *T. R.* 479.
(*g*) 2 *T. R.* 483 (*a*).

The certified copy of the deed of settlement was improperly received in evidence: it was not admissible to prove either the execution, or the contents, of the deed. The doctrine of *Slatterie* v. *Pooley* (*a*), which was supposed to justify its reception, is this, — that an admission by a party, may be proof of a *fact*, but not that it admits the contents of a deed. [*Maule*, J. What the party says, about the contents of a deed, is primary and original evidence.] The case of *Slatterie* v. *Pooley* is not to be extended. [*Maule*, J. It certainly is not very satisfactory in its reasons. The decision was founded upon a passage in *Phillips* on Evidence (*b*), which in itself does not seem to me to be very sound. What the party himself says, is not before the jury, — but only the witness's representation of what he said. What a man says, is, generally, and very properly, evidence against him: but a verbal representation by a third person is quite another thing. (*c*)] The doctrine of *Slatterie* v. *Pooley* was under discussion in this court in *Bringloe* v. *Goodson* (*d*) and *Howard* v. *Smith* (*e*), in the latter of which it is somewhat narrowed. The deed is only before the court with reference to the admission that it is the deed referred to. [*Maule*, J. I rather think the rule laid down in *Slatterie* v. *Pooley* has been extended to all the words of the instrument.] The rule, at all events, does not apply, where there is an attesting-witness: *Bailey* v. *Bid-*

(*a*) 6 *M.* & *W.* 664.

(*b*) 8th edit. Vol. I. p. 364. But see 10th edit. Vol. I. pp. 321—324.

(*c*) According to *Slatterie* v. *Pooley*, what *A.* states as to what *B.*, a party, h said respecting the contentof a document which *B.* has seen, is admissible, whilst what *A.* states respecting a document which he himself has seen, is not admissible, — although, in the latter case, the chance of error is single, in the former, double.

(*d*) 5 *N. C.* 738., 8 *Scott*, 71.

(*e*) 3 *M.* & *G.* 254., 3 *Scott*, *N. R.* 574.

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well (*a*); *Streeter* v. *Bartlett.* (*b*) In the latter case, it was held, that, in order to prove an admission of a debt, by the medium of an entry in a schedule filed by the defendant in the insolvent debtors court, it is necessary to prove the defendant's signature, by calling the subscribing-witness, — even where the document has been acted upon by the court. [*Maule*, J. You might as well attempt to dispense with the attesting-witness, by proving that the party had sealed and delivered the deed, — the very thing the attesting-witness is required for.] The act requires the deed to be inrolled by two of the directors: is the whole body to be bound by the admission of the two who deposit the deed? In *Molton* v. *Harris* (*c*), it was held that the memorial of a conveyance that has been registered, is not evidence of the contents of such conveyance, unless notice has been given to the opposite party to produce the conveyance. [*Maule*, J. That case was decided about half a century before *Slatterie* v. *Pooley*.] In *Doe* d. *Loscombe* v. *Clifford* (*d*), it was held, that an examined copy of a memorial of a purchase-deed, registered in *Middlesex*, under the statute 7 *Ann. c.* 20., is only receivable as secondary evidence of the deed, against the parties to the deed, and all persons claiming under them; and that the fact that *A.* mortgaged the property to *B.*, and delivered this deed to *B.* as mortgagee, is not sufficient to make it secondary evidence against *A.* That was a decision by one of the judges who were parties to *Slatterie* v. *Pooley*. [*Maule*, J. I cannot help thinking that "secondary" is a mistake there.] In *Wollaston* v. *Hakewill* (*e*), the registered memorial of a deed conveying lands in *Middlesex*, was held to be secondary evidence of the contents of such deed, against the personal representatives of the party by whom such deed is registered. The case of

(*a*) 13 *M. & W.* 73.
(*b*) *Antè*, Vol. V. p. 562.
(*c*) 2 *Esp. N. P. C.* 549.
(*d*) 2 *Car. & K.* 448.
(*e*) 3 *M. & G.* 297., 3 *Scott, N. R.* 593.

The Fishmongers' Company v. *Robertson* (*a*) is also an authority in favour of the plaintiff, so far as regards the opinion of *Tindal*, C. J., which is unaffected by the subsequent decision of the court of error. (*b*) [*Maule*, J. In that case it was sought to prove an admission by a defendant, that a certain paper was the original agreement: and it was objected that that could not be done without calling the attesting-witness. That can have nothing to do with this case.] The court of Queen's Bench in *Ireland*, in a recent case of *Lawless* v. *Queale* (*c*), express very strong disapprobation of the doctrine of *Slatterie* v. *Pooley*. That was an action of use and occupation: the plaintiff proved by a witness the fact of the occupation by the defendant, and, on his cross-examination, he admitted that there was a written agreement in existence, which the plaintiff did not produce: and it was held, that such instrument ought to have been given in evidence, and that a declaration by the defendant, of holding at a particular rent, was not admissible. *Pennefather*, C. J., there says: "Several cases were cited for the purpose of establishing, not that the broad principle of law was not right, but that, in these particular cases, certain exceptions to the rule of evidence may have been introduced, which would admit the introduction of parol evidence. The case of *Newhall* v. *Holt* (*d*) was relied on. That was an action for goods sold and delivered, and on an account stated; and it was held that a parol admission by the defendant of the debt due, was evidence under the account stated, though it appeared there was a written agreement relative to the goods. This was the decision of the court, though *Parke*, B., observes — 'What a defendant says is *always* evidence against him, although it may have arisen out of a written agreement.' It is

(*a*) *Antè*, Vol. I. p. 60.
(*b*) *Antè*, Vol. VI. p. 896.
(*c*) 8 *Irish Law Reports*, 382.
(*d*) 6 *M. & W.* 662.

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not easy to encounter a loose and incorrect note of this sort, because it is impossible to say to what Baron *Parke* intended to apply that observation, and it is not sufficiently intelligible to be an authority. *Slatterie* v. *Pooley* is the next case, and appears to be the leading one in support of the doctrine that a parol admission by a party to a suit is always receivable as evidence against him, although it relates to the contents of a deed or other written instrument, and *even although its contents be directly in issue in the cause.* I cannot subscribe to what was said by *Parke*, B., in that case, though it is added, that Lord *Abinger* (who did not hear the arguments) concurred. The doctrine there laid down is a most dangerous proposition: by it a man might be deprived of an estate of 10,000*l.* *per annum*, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, had mortgaged, or otherwise incumbered it; and thus, by this facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." And see the remarks of *Crampton*, J., upon the cases of *Newhall* v. *Holt*, *Slatterie* v. *Pooley*, and *Howard* v. *Smith*. [*Williams*, J. It is impossible for us to overrule *Slatterie* v. *Pooley*, though we may think the *reasoning* not quite satisfactory.] (*a*)

Byles, Serjt., and *Bernard*, in support of the rule. The agreement under which *Boulter*, *Brooke*, and *Peplow* hired the premises in question, was made by them on behalf of the company; the premises were used for the purposes of the company; and the rent which was paid, was paid by cheques upon their

(*a*) See *Taylor on Evidence*, 293, 294.

ankers. The company, having thus recognised and onfirmed the agreement, were bound by it: Lord Petre v. *The Eastern Counties Railway Company* (a); Fleadow v. *The Hull Glass Company.* (b) *White* and Fillett might have sued the company. [*Maule*, J. Not pon the agreement.] For use and occupation; and, udgment having been recovered against the company, xecution might have been obtained against any of the hareholders. But one member could have had no emedy against another who had paid more than himself n account of the company. The case clearly falls within the authority of *Holmes* v. *Higgins.* (c) It was here held that an action was maintainable by an agent employed in endeavouring to pass a bill through parliament for making a railway, against the chairman of the committee, where the agent was himself a subscriber. In *Sadler* v. *Nixon* (d), where *A.* recovered against *B.*, *C.*, and *D.*, partners in trade, upon their joint contract, and took in execution *B.* only, who thereupon paid the whole sum recovered, — it was held, that *B.* could not recover in a court of law against his co-defendants, for contribution. In *Bovill* v. *Hammond* (e), where two persons jointly undertook to procure a cargo for a vessel, for certain commission which they agreed to divide equally between themselves, and one of them received on account of such commission a certain sum of money, — it was held that the other could not maintain money had and received for a moiety, the demand arising out of a partnership transaction, and no account having been settled between them. So, in *Milburn* v. *Codd* (g), a joint-stock company, in which *A.*, *B.*, and

(a) 1 *Railway Cases*, 462.
(b) 19 *Law Journ. N. S.*, *Chan.* 44.
(c) 1 *B. & C.* 74., 2 *D. & R.* 196.
(d) 5 *B. & Ad.* 936., *S. C.* (*nom. Sadler* v. *Hickson*) 3 *N. & M.* 258.
(e) 6 *B. & C.* 149., 9 *D. & R.* 186.
(g) 7 *B. & C.* 419., 1 *M. & R.* 238.

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C. were shareholders, was dissolved: *A.* and *B.*, being sued by a creditor of the concern, employed *C.*, who was an attorney, to defend them: and it was held, that *C.* could not sue *A.* and *B.* for his bill of costs. Lord *Tenterden* there said: "The actions which the plaintiff defended, were actions brought against the defendants as members of a partnership of which the plaintiff was also a member. When an action was commenced, it was the duty of all the partners in the late company, either to pay the money, or to resist the demand; and, in case of resistance, the expense ought to be paid by all, — the plaintiff among the rest."

The certified copy of the registered deed was properly received in evidence. [*Maule*, J. We all think so too.]

Charnock, who appeared for *Brooke*, submitted that he, at all events, was not liable in respect of rent accruing after he had resigned his office of committee-man, and his resignation had been accepted by his co-directors. [*Maule*, J. *White* and *Gillett* might have sued *Brooke* for the whole rent, and he might have sued *Boulter* and *Peplow* for contribution. If he would be entitled to contribution, it could only be by virtue of the mutual contract.]

MAULE, J. Two questions have been argued in this case. The court has already intimated an opinion that the copy of the deed was properly received, upon the authority of the *dictum* in *Slatterie* v. *Pooley*(a), which has frequently been recognised and acted upon. That being so, the only remaining question, is, whether the plaintiff is entitled to recover contribution against the defendants in these two actions. It appears that

(a) 6 *M. & W.* 664.

the plaintiff, *Peplow*, and *Brooke*, were three of several persons who were associated together for the purpose of establishing a gas-company; that the three applied to *White* and *Gillett*, the landlords of premises in the *Old Jewry*, to let the same to them; that *White* and *Gillett* accordingly demised the premises to them, and to them only, by a written agreement; that, rent being in arrear, the plaintiff, *Peplow*, and *Brooke* were sued in a joint action; that *Peplow* and *Brooke* suffered judgment by default; and that *White* and *Gillett* recovered a certain sum in that action, the whole of which, together with the costs, was paid by the plaintiff. *Primâ facie*, where one of three joint-contractors who are jointly sued, pays the whole debt, he is entitled to receive contribution from the other two. That state of circumstances exists here: and the only question is, whether there existed any other facts which afford an answer to the plaintiff's right to such contribution. It does not appear to me that any such answer has been given. It is suggested that there was a partnership, or a *quasi* partnership, between the plaintiff, *Peplow*, and *Brooke*, and others, and that, consequently, the plaintiff might be entitled to have an account taken in a court of equity, but not to contribution at law. But I think, supposing such partnership did exist, it by no means follows that the plaintiff would not be entitled to recover in this action. The three entered into a joint contract with *White* and *Gillett*, who probably would not have dealt with a larger number. Those three, therefore, alone incurred a joint liability to pay the rent; and they would be subject to contribution amongst themselves. Although it may be, that, when each of the three has paid his share of the rent in respect of that joint liability, each may be entitled to charge such share in the partnership account, it by no means follows that the right of contribution *inter se* does not

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likewise exist. Each was liable *in solido* to the original demand: and from that arises an implied contract that the one who pays the whole shall be reimbursed, in their respective proportions, by the other two. There is nothing that I can discover here, to shew that these parties did not intend that the ordinary implication should arise in this case. On the contrary, I think there is every reason to infer that they intended to incur the ordinary liabilities incident to such a contract as they had entered into; and that inference is not rebutted by the circumstance that the money they are called upon to pay under that contract, may be chargeable by them against the company for whose benefit they assumed the liability. Upon the simple ground, therefore, of the inference arising from the position of the parties, and of that inference not being rebutted by any of the facts found in this case, it seems to me that the plaintiff is entitled to retain his verdict. The cases cited have most of them very little to do with the matter: and none of them goes to shew, that, under circumstances like these, an action is not maintainable. I therefore think this rule must be discharged.

WILLIAMS, J. I am of the same opinion. The circumstances are shortly these:—The plaintiff, *Peplow*, and *Brooke* entered into a contract with third persons, whereby they made themselves jointly liable for rent of certain premises. The premises so hired were intended to be used as the place of business of a joint-stock company, of which those three persons were members. Whatever remedy they might have as against the other members of the company, when these persons placed themselves under this liability to the landlords of the premises, they likewise came under an implied liability *inter se*, that, if one should be called upon to pay, and should actually pay, the whole rent, the other two

would reimburse him to the extent of their respective shares. And this implied contract is not in any degree affected by the rule of law, that one partner cannot sue his co-partners in respect of a partnership debt.

TALFOURD, J. I am of the same opinion. The contract out of which this cause of action arises, is entirely collateral to the partnership: and the defendants are liable to contribution irrespectively of the state of accounts amongst the partners.

Rule discharged.

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A., the farming bailiff of Lord *D.* (after his employment as such had ceased), received a cheque for 180*l.* in payment for wheat belonging to Lord *D.*, which he had sold on his account while acting as bailiff, and paid it in to his own account with *B.* & Co., his bankers, who received the cash for it, and gave *A.* credit for the amount, but afterwards, under an indemnity from Lord *D.*, refused to honour his drafts: — Held, that, even assuming that the cheque had been improperly obtained by *A.*, still, as between him and his bankers, the amount was recoverable by *A.*, as money had and received by them to his use, or money paid.

THE first of these cases was an action of debt brought against the defendant, as public officer of *The London and County Joint-Stock Banking Company*, for money lent by the plaintiff to the company, money received by them for the use of the plaintiff, and money found to be due to the plaintiff on an account stated with them.

The defendant pleaded that the company were never indebted; and also a special plea, which the plaintiff traversed by his replication.

The second of the above actions was an action on the

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case against the defendant as public officer of the same banking company, for dishonouring two cheques of the plaintiff, when he had a balance in their hands, and for exposing his account to a third person.

The first count in the last-mentioned action, stated, that *Emanuel Cooper*, the defendant in this suit, — one of the public officers of certain persons united in co-partnership for the purpose of carrying on, and who at the several times therein-after mentioned, and thence continually, carried on, &c., the trade and business of bankers in *England*, under the name of "*The London and County Joint-Stock Banking Company*," and who were at the time of the commencement of this suit, and still continued to be, entitled to sue and be sued in the name of one of the public officers of such co-partnership, as the nominal plaintiff or plaintiffs on their behalf, according to the statute made in the seventh year of the reign of the late King *George* the Fourth (*a*), for, among other things, the better regulating co-partnerships of certain bankers in *England*, and according to another statute made in the eighth year of the reign of our Lady the now Queen, intituled "An act to regulate joint-stock banks in *England*" (*b*), which said *Emanuel Cooper* had been duly nominated and appointed, and was at the commencement of this suit, and still continued, one of the public officers of the said co-partnership, according to the form and effect of the said statutes, — had been summoned to answer the plaintiff in an action on the case. It then proceeded to state, that the said *London and County Joint-Stock Banking Company*, before and at the several times thereinafter mentioned, were, and still continued to be, bankers, and used, exercised, and carried on the trade and business of bankers, to wit, at *Tonbridge*, in the county of *Kent*: That, on the

(*a*) 7 *G.* 4. *c.* 46. (*b*) 7 & 8 *Vict. c.* 113.

10th of *March*, 1843, the plaintiff, at the request of the said banking company, retained and employed the said company in the way of their said trade and business, to be the bankers of the plaintiff, and to receive, account for, and pay, according to the usage and custom of bankers in that behalf, such sums of money as the plaintiff might pay or intrust, or cause to be paid or intrusted, to the said company, as bankers of the plaintiff as aforesaid, or as might come to, or be in, the hands of the said company on account of the plaintiff, as such bankers as aforesaid; and the said company then accepted of, and entered upon, the said retainer and employment, and, by reason thereof, it became and was, and during all the times hereinafter mentioned continued to be, the duty of the said company, as such bankers as aforesaid, and according to the usage and custom of bankers in that behalf, to honour and pay the drafts or orders in writing of the plaintiff, duly drawn on the said company, for the amount of the cash balances of the plaintiff, or any part thereof, in the possession of the said company, when duly presented to the said company for payment, at their place of business at *Tonbridge* aforesaid, by any person or persons entitled to receive the amount of such drafts or orders, provided the said company should, at the time of the presentment of any such drafts or orders respectively, have in their hands, as the bankers of the plaintiff, a cash balance of the plaintiff sufficient to pay the amount of such drafts or orders respectively, without, or over and above, any just claim or lien of the said company upon the same, or any part thereof, and provided such cash balance should have been in the hands of the said company a sufficient and reasonable time to enable them and their clerks to know of the same being in the hands of the said company, without, or over and above, any such claim or lien as aforesaid; That, after the plaintiff

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case against the defendant as public officer of the same banking company, for dishonouring two cheques of the plaintiff, when he had a balance in their hands, and for exposing his account to a third person.

The first count in the last-mentioned action, stated, that *Emanuel Cooper*, the defendant in this suit, — one of the public officers of certain persons united in co-partnership for the purpose of carrying on, and who at the several times therein-after mentioned, and thence continually, carried on, &c., the trade and business of bankers in *England*, under the name of "*The London and County Joint-Stock Banking Company*," and who were at the time of the commencement of this suit, and still continued to be, entitled to sue and be sued in the name of one of the public officers of such co-partnership, as the nominal plaintiff or plaintiffs on their behalf, according to the statute made in the seventh year of the reign of the late King *George* the Fourth (*a*), for, among other things, the better regulating co-partnerships of certain bankers in *England*, and according to another statute made in the eighth year of the reign of our Lady the now Queen, intituled "An act to regulate joint-stock banks in *England*" (*b*), which said *Emanuel Cooper* had been duly nominated and appointed, and was at the commencement of this suit, and still continued, one of the public officers of the said co-partnership, according to the form and effect of the said statutes, — had been summoned to answer the plaintiff in an action on the case. It then proceeded to state, that the said *London and County Joint-Stock Banking Company*, before and at the several times thereinafter mentioned, were, and still continued to be, bankers, and used, exercised, and carried on the trade and business of bankers, to wit, at *Tonbridge*, in the county of *Kent*: That, on the

(*a*) 7 *G.* 4. *c.* 46. (*b*) 7 & 8 *Vict. c.* 113.

10th of *March*, 1843, the plaintiff, at the request of the said banking company, retained and employed the said company in the way of their said trade and business, to be the bankers of the plaintiff, and to receive, account for, and pay, according to the usage and custom of bankers in that behalf, such sums of money as the plaintiff might pay or intrust, or cause to be paid or intrusted, to the said company, as bankers of the plaintiff as aforesaid, or as might come to, or be in, the hands of the said company on account of the plaintiff, as such bankers as aforesaid; and the said company then accepted of, and entered upon, the said retainer and employment, and, by reason thereof, it became and was, and during all the times hereinafter mentioned continued to be, the duty of the said company, as such bankers as aforesaid, and according to the usage and custom of bankers in that behalf, to honour and pay the drafts or orders in writing of the plaintiff, duly drawn on the said company, for the amount of the cash balances of the plaintiff, or any part thereof, in the possession of the said company, when duly presented to the said company for payment, at their place of business at *Tonbridge* aforesaid, by any person or persons entitled to receive the amount of such drafts or orders, provided the said company should, at the time of the presentment of any such drafts or orders respectively, have in their hands, as the bankers of the plaintiff, a cash balance of the plaintiff sufficient to pay the amount of such drafts or orders respectively, without, or over and above, any just claim or lien of the said company upon the same, or any part thereof, and provided such cash balance should have been in the hands of the said company a sufficient and reasonable time to enable them and their clerks to know of the same being in the hands of the said company, without, or over and above, any such claim or lien as aforesaid; That, after the plaintiff

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had retained and employed the said company as aforesaid, and they had accepted of such retainer and employment as aforesaid, and while the said company were and continued to be such bankers of the plaintiff as aforesaid, to wit, on the 30th of *January*, 1847, the plaintiff duly made his certain draft or order in writing, dated the day and year last aforesaid, and directed the same to the said banking company, and thereby required them to pay to him the plaintiff, or the bearer thereof, 8*l.* 15*s.*, and the plaintiff then delivered the said draft or order to one *Thomas Poole*, who thereby then became and was, and until and at the time of the presentment thereof, and refusal of payment, as hereinafter mentioned, continued to be, the bearer thereof, and entitled to receive the amount of the said draft or order: That the said draft or order was afterwards, and before the commencement of this suit, and while the said company continued to be the bankers of the plaintiff as aforesaid, to wit, on the day and year last aforesaid, duly presented by the said *Thomas Poole* to the said banking company, at their place of business at *Tonbridge* aforesaid, for payment thereof; and that, although the said company, at the time when the said draft or order of the plaintiff was so presented for payment as aforesaid, and was refused payment as hereinafter mentioned, continued to be the bankers of the plaintiff as aforesaid, and had in their hands, as the bankers of the plaintiff, a cash balance of the plaintiff sufficient to pay the amount of the said draft or order, without any just claim or lien of the said company on such balance, or any part thereof; and although the said company, at the time when the said draft or order of the plaintiff was so presented as aforesaid, and dishonoured as hereinafter mentioned, had had the said cash balance of the plaintiff in their hands a sufficient and reasonable time to enable them and their clerks to know of the same

eing in the hands of the said company, without any uch claim or lien as aforesaid, and, by reason of the remises, ought to have then paid the amount of the said raft or order to the said *Thomas Poole:* yet the said anking company, disregarding their duty as such bankers s aforesaid, and contriving and intending to injure and ggrieve the plaintiff in that behalf, did not nor would, hen the said draft or order was so presented to them r payment as aforesaid, pay or honour the same, but holly neglected and refused so to do, and then disonoured and refused to pay the same, or any part of e amount thereof, contrary to their duty as such ankers of the plaintiff as aforesaid. [The count then roceeded in like manner to allege the dishonour of a raft for 27*l.* 8*s.* 8*d.*, drawn by the plaintiff in favour f one *Robert Billing*, and concluded as follows:—] y reason of all which premises, the plaintiff not only st the use of the said cash balance so in the hands of e said company as aforesaid, but was and is greatly jured and damaged in his credit and reputation with he said *Thomas Poole, Robert Billing, William Jemett*, and *Virgil Pomfret, Thomas Beeching, Horatio Beeching*, and *Stephen Beeching*, and *Francis John Headland*, and with divers other persons to whom the facts foresaid necessarily became and were known, and was bliged to give, and did give notice, to one *Richard Woodhams*, then being a creditor of the plaintiff, not o present for payment to the said company a certain ther draft or order in writing for the payment of 4*l.* 17*s.* 4*d.*, which the plaintiff had before then drawn pon the said company as such bankers as aforesaid, nd had delivered to the said *Richard Woodhams* in ayment of a debt then owing to him from the plaintiff; nd the plaintiff had been and was, by means of the remises, otherwise greatly injured and damnified.

The second count stated, that, while the said com- Second count.

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pany were such bankers as aforesaid, and used and exercised the said trade and business as aforesaid, to wit, on the 10th of *March*, 1843, the plaintiff, at the request of the said company, retained them, in the way of their said trade and business, to be the bankers of the plaintiff, and to receive, account for, and pay, as such bankers, such sums of money as the plaintiff might pay or intrust to the said company as the bankers of the plaintiff, or as might come to their hands on account of the plaintiff, as such bankers as aforesaid, and to perform and keep the duties of bankers to and for the plaintiff: that the said company then accepted of and entered upon the last-mentioned retainer and employment: that, by reason of the premises, it thereupon became and was the duty of the said company, as such bankers to and for the plaintiff, while they should remain and continue such bankers of the plaintiff as last aforesaid, among other things, to keep an account of all moneys from time to time received and paid by them as such bankers as last aforesaid, for or on account of the plaintiff, and not to expose or disclose the state or particulars of the said account so to be kept by them as aforesaid, without the licence or authority of the plaintiff, to any person or persons, except the plaintiff and the clerks, agents, or servants employed by the said company in their said business, and except to any person who might present for payment to the said company any cheque, bill, or note, drawn, accepted, or made by the plaintiff, upon, or payable by, the said company, which the said company might be entitled to dishonor, for want of sufficient funds of the plaintiff of right applicable to the payment thereof, or unless compelled by due course of law so to do: that the said company remained and continued to be such bankers of the plaintiff as last aforesaid, from the time of their being so retained and employed as in that count afore-

ıtil and at and after the time of the committing grievances thereinafter mentioned: that, during e while they were such bankers of the plaintiff aforesaid, and before the committing of the ces thereinafter mentioned, the said company, as nkers of the plaintiff as last aforesaid, received d divers and very many large sums of money for account of the plaintiff, under and by virtue of id last-mentioned retainer and employment, and ch an account thereof as aforesaid, under and in ıce of their said retainer and employment, and of id duty in that behalf; and, at the time of the ting of the grievances thereinafter mentioned, l account was still current, not wound up, or ned: nevertheless, the said company, wholly ding their duty in that behalf, and contriving, ongfully intending, to injure and aggrieve the f, and to destroy and ruin his fame and credit, hey were such bankers of the plaintiff as last d, and kept such account as aforesaid, to wit, on ı of *January*, 1847, wrongfully and unjustly, and the licence or authority of the plaintiff, exposed losed the state and particulars of the said account by them of the said moneys received and paid ı as such bankers as last aforesaid for and on ac- f the plaintiff, to a certain person, to wit, *Philip* , Baron *De L'Isle and Dudley*, who was not a clerk, or agent employed by the said company said business, and who did not present for pay- the said company any cheque, bill, or note, accepted, or made by the plaintiff, and without ompelled, by due course of law, or otherwise, so ontrary to their duty to the plaintiff, as such as last aforesaid, and in breach of the trust in them by the plaintiff, as in that count afore- ıd that, by reason thereof, the plaintiff was then

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greatly injured in his credit with the said *Philip Charles*, Baron *De L'Isle and Dudley*, and the said *Philip Charles*, Baron *De L'Isle and Dudley*, was thereby induced and caused to lay claim, and did lay claim, to the cash balance of the plaintiff then in the hands of the said company as such bankers as aforesaid, and was also thereby led and induced to make, and did make, divers other claims and demands on the plaintiff, to the great trouble, expense, anxiety, vexation, and annoyance of the plaintiff; and the plaintiff had been and was, by means of the premises, otherwise injured and damnified, &c.

Pleas.

The defendant pleaded,—first, that the said banking company were not guilty,—secondly (and sixthly), that the plaintiff did not retain and employ the company as bankers,—thirdly (and fourthly), that the company had not any cash balance of the plaintiff in their hands sufficient to pay the cheques,—fifthly (and seventhly), that, before and at the time when the plaintiff retained the said banking company as in the declaration mentioned, the plaintiff was the farm-bailiff and agent of Baron *De L'Isle and Dudley*, and that the plaintiff retained and employed the said banking company, as in the declaration mentioned, as such bailiff and agent as aforesaid, at the request and by the direction of the said baron, but in his own name, and without disclosing to the said company that the said baron was his principal, and that he the plaintiff retained and employed the said banking company as the agent of the said baron, and not on his own account: that the said cash balances which were so in the hands of the said banking company as in the declaration mentioned, at the several times when the said drafts or orders were so respectively presented for payment, and so refused payment, as in the declaration mentioned, were respectively cash balances composed of moneys belonging to the said baron,

said, until and at and after the time of the committing of the grievances thereinafter mentioned: that, during the time while they were such bankers of the plaintiff as last aforesaid, and before the committing of the grievances thereinafter mentioned, the said company, as such bankers of the plaintiff as last aforesaid, received and paid divers and very many large sums of money for and on account of the plaintiff, under and by virtue of their said last-mentioned retainer and employment, and kept such an account thereof as aforesaid, under and in pursuance of their said retainer and employment, and of their said duty in that behalf; and, at the time of the committing of the grievances thereinafter mentioned, the said account was still current, not wound up, or determined: nevertheless, the said company, wholly disregarding their duty in that behalf, and contriving, and wrongfully intending, to injure and aggrieve the plaintiff, and to destroy and ruin his fame and credit, while they were such bankers of the plaintiff as last aforesaid, and kept such account as aforesaid, to wit, on the 20th of *January*, 1847, wrongfully and unjustly, and without the licence or authority of the plaintiff, exposed and disclosed the state and particulars of the said account so kept by them of the said moneys received and paid by them as such bankers as last aforesaid for and on account of the plaintiff, to a certain person, to wit, *Philip Charles*, Baron *De L'Isle and Dudley*, who was not a servant, clerk, or agent employed by the said company in their said business, and who did not present for payment to the said company any cheque, bill, or note, drawn, accepted, or made by the plaintiff, and without being compelled, by due course of law, or otherwise, so to do, contrary to their duty to the plaintiff, as such bankers as last aforesaid, and in breach of the trust reposed in them by the plaintiff, as in that count aforesaid: and that, by reason thereof, the plaintiff was then

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drafts or orders, and did dishonour the same, as they lawfully might for the cause aforesaid,—which were the same grievances as in the declaration mentioned; verification.

Replications.

The plaintiff joined issue on the first, second, third, fourth, and sixth pleas; and replied to the fifth, that he, the plaintiff, did not retain or employ the said banking company as in the declaration first mentioned as such bailiff and agent, or as such bailiff or agent as in the said fifth plea mentioned, nor were the said cash balances which were so in the hands of the company as in the declaration and fifth plea mentioned, or either of them, composed of moneys belonging to the said baron, or which the plaintiff, as such agent and bailiff, or as such agent or bailiff as aforesaid, paid to or deposited with the said banking company, in manner and form as the defendant had in his said fifth plea above alleged, —concluding to the country: and to the seventh plea he replied *de injuriâ*.

The defendant joined issue on the replications to the fifth and seventh pleas.

The above causes were tried at *Guildhall* before *Wilde*, C. J., and by special juries, at the sittings after *Hilary* term, 1848, when a verdict was found for the plaintiff in the first action, for 128*l.* 1*s.* 10*d.*, and in the second action for 40*s.* damages,—subject to the opinion of the court, in both actions, upon the following case:—

The plaintiff, *William Tassell*, at the times in question, resided at *Penshurst*, in *Kent*, and kept a banking account with *The London and County Joint-Stock Banking Company*,—a partnership of more than six persons, who carried on business as bankers in *London* and *Tunbridge* and other places, under the provisions of the statutes 7 *G.* 4. *c.* 46. and 7 & 8 *Vict. c.* 113.: and he brought the first of those actions to recover 128*l.* 1*s.* 10*d.*, being the balance in his favour on the said banking

and which the plaintiff had, as such agent and bailiff as aforesaid, before the accruing of any of the causes of action in the introductory part of the plea mentioned, to wit, on the 20th of *January*, 1847, paid to and deposited with the said banking company, in his own name, and without disclosing to the said company that the said baron was his principal, or that the said moneys were the proper moneys of the said baron: that the said cash balances were the proper moneys of the said baron, and that the plaintiff, at any time, had not any lien upon the said cash balances as against the said baron, nor any right to have the said cash balances, or any part thereof, paid to him, the plaintiff, by the said banking company, except as such agent of the said baron as aforesaid, and by the permission of the said baron: that, after the plaintiff had so retained and employed the said banking company as aforesaid, and whilst the said cash balances were so in the hands of the said banking company as aforesaid, and before the said drafts or orders, or either of them, were so drawn, or were so presented for payment, as in the declaration mentioned, to wit, on the 22nd of *January*, 1847, the said baron gave notice to the said banking company of all the premises in this plea mentioned, and then directed and required the said banking company to retain in their hands the said cash balances for the use of him the said baron, and not to pay or deliver the same, or any part thereof, to the plaintiff or his order; to which said request of the said baron, the said banking company then assented,—of all which premises in this plea aforesaid, the plaintiff afterwards, and before he drew the said drafts or orders in the declaration mentioned, or either of them, had notice: and that therefore the said banking company, at the several times when &c. in the declaration mentioned, did refuse to pay the said

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time to time during the continuance of the said banking account, made payments on account of the said Lord *De L'Isle* and other parties, and also on his own private account, by cheques drawn on the said banking company, upon the balance standing to his credit in the said account. The company occasionally discounted bills for the plaintiff, and placed the money thence arising to his credit in the said account, and sometimes allowed him to overdraw his said account. The whole of the cheques drawn by the plaintiff against the said account, and paid by the company out of it, were signed by the plaintiff in his own name only; and the account, as well as the usual pass-book, was kept by the company under the plaintiff's name only. Until the company received the notice from Lord *De L'Isle* hereinafter mentioned, they were not aware that his lordship had any concern with the plaintiff's account with them, or that the plaintiff was his farming-bailiff.

At the trial, the pass-book containing the said banking account, as entered and made up by the banking company, was put in, and proved to have been delivered to the plaintiff on the 20th of *February*, 1847. The items on both sides of the account, down to the end of the year 1846, are very numerous, and are not thought to be material to be set out: but the following is a copy of the entries in the pass-book from *January* 1. 1847, to the end of the account, shewing the receipts by the company from the plaintiff, and payments made by them on his cheques during the said month of *January*, with the respective dates of such receipts and payments:—

Receipts.

1847. Jan. 1. Balance	167	14	11
„ 20. Cash	180	4	8
£	347	19	7

Payments.

1847. Jan. 2.	Self	125	0	0
„ 5.	*Bates*	5	0	6
„ „	*Chapman*	5	2	7
„ „	*Collins*	4	3	1
„ 8.	Self	10	0	0
„ 22.	*Whisson*	11	13	0
„ „	Self	30	0	0
„ 23.	*Wood*	6	15	7
„ 26.	*Constable*	8	15	6
„ „	*Humphrey*	13	7	6
		£ 219	17	9

The balance of the account shewn by the said pass-book in favour of the plaintiff on the 1st of *January*, 1847, was, 167*l.* 14*s.* 11*d.*, being the sum remaining after deducting the payments made by the company in 1846 from their receipts of the plaintiff during the same year. As well the receipts as the payments of 1846 consisted of sums of money paid in and drawn out on his own account and on account of the other parties.

The only sum paid in by the plaintiff to his credit after the above date, was, a cheque drawn by *Vines & Tomlin* on *Barclay* & Co., for 150*l.* 4*s.* 6*d.*, dated the 19th of *January*, 1847, which was paid in by the plaintiff on the same day to the said *Tunbridge* branch bank, and was carried to *London* by the said banking company, and was placed to the plaintiff's credit on the 20th of *January*. This cheque had been received by the plaintiff from *Vines & Tomlin* in payment for some wheat of Lord *De L'Isle*'s arising from the said farm, which wheat the plaintiff, as such bailiff of his lordship as above mentioned, had, in *December*, 1846, employed *Vines & Tomlin* to sell.

It will be seen by the pass-book, that there were ten

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of the plaintiff's cheques paid by the company between the 1st and the 27th of *January*.

On the 19th of *January*, 1847, the balance appearing due to the plaintiff in his said banking account, was 18*l.* 8*s.* 9*d.* On the 20th of *January*, he was credited with 180*l.* 4*s.* 8*d.*, the proceeds of *Vines & Tomlin*'s cheque, thereby making a balance in his favour of 198*l.* 13*s.* 5*d.*: but, on the 22nd, he drew out by two cheques 41*l.* 13*s.*, and, on subsequent days, the further amount of 28*l.* 18*s.* 7*d.*, and thereby reduced the balance due to him to 128*l.* 1*s.* 10*d.*, which still remains unpaid to him, and is the amount claimed in the action of debt,—the banking account having remained in the same state down to the present time.

On the 27th of *January*, 1847, the plaintiff drew a cheque on the said banking company, in the usual form, for 27*l.* 8*s.* 8*d.*, in favour of the Rev. *R. Billing*, or bearer, and which cheque he delivered on the same day to the Rev. *R. Billing* in payment of a debt of that amount due from the plaintiff to him. The Rev. *R. Billing*, through his banker's clerk, *F. J. Headland*, duly presented this cheque for payment, on the 29th of *January*, to the said branch bank at *Tunbridge*, where the plaintiff's account was kept; and the said company refused to pay the same, but referred the bearer of the cheque to the plaintiff.

On the 30th of *January*, 1847, the plaintiff also drew a cheque on the said company, in the usual form, for 8*l.* 15*s.*, payable to self, or bearer, and caused the same to be duly presented by his agent, *Thomas Pook*, for payment, on the same day, to the said branch bank: but the said company refused to pay the same, and referred the bearer thereof to the plaintiff.

The dishonour of these two cheques arose out of the following circumstances: — After *Michaelmas*, 1846, Lord *De L'Isle* became dissatisfied with the state of the accounts between himself and the plaintiff as his farm-bailiff, and, on the 11th of *January*, 1847, his lordship,

through Mr. *Glendinning*, told the plaintiff he was not from that time to deal any more with Lord *De L'Isle*'s property, but to confine his services to giving orders to the men, and to seeing that they did their work on the farm.

Some time between this date and the 28th of *January*, Lord *De L'Isle*, having learnt that the plaintiff had an account with the said banking company, went with Mr. *Glendinning* to the said *Tunbridge* branch bank, and applied to the company's manager there for leave to inspect the plaintiff's banking account which the company kept in their books there according to the usage of bankers. This the manager refused, unless he had instructions to do so from the principal office of the bank in *London*. Lord *De L'Isle*, having applied to that office, obtained such instructions, and again, in company with Mr. *Glendinning*, applied to the *Tunbridge* branch bank on the 28th of *January*; and they were then allowed by the manager there to inspect the plaintiff's account, of which he furnished them with a copy. Upon inspecting this account, Lord *De L'Isle* served the bank with a notice, signed by him, of which the following is a copy:—

"To *The London and County Joint-Stock Banking Company.*

28*th January*, 1847.

"Please to hold in your hands, until further correspondence, the balance of 128*l.* 1*s.* 10*d.* on credit of the account of Mr. *Tassell*, the same being formed of money belonging to me; and I engage to hold you harmless for so doing.

(Signed) *De L'Isle.*"

It was in consequence of this notice that the company dishonoured the plaintiff's cheques, as above mentioned.

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After inspecting the account, Mr. *Glendinning*, on the same day, by authority of Lord *De L'Isle*, went to the plaintiff, and told him he had been receiving money for Lord *De L'Isle*'s wheat; to which the plaintiff replied that he had. Mr. *Glendinning* then said—"How dare you do it, after my orders? Did I not tell you that you were not to deal with Lord *De L'Isle*'s property, when I gave you orders some time ago?" The plaintiff replied—"You did: but you did not tell me not to receive money; and I had a right to receive it." To this Mr. *Glendenning* rejoined—"If you don't consider money property, I don't know what is." *Glendenning* then demanded the plaintiff's books, which he refused to give up: and he also refused to give a cheque for the balance of his said banking account, which *Glendinning* demanded. The latter then, by Lord *De L'Isle*'s authority, discharged the plaintiff from his lordship's service, and put a person in possession of the farm.

On a subsequent investigation of the accounts rendered by the plaintiff to Lord *De L'Isle*, of the plaintiff's receipts and disbursements as farming-bailiff to his lordship, it appeared, that, on the 29th of *September*, 1846, there was a balance of 446*l.* 19*s.* 4*d.* in favour of his lordship; and, by a supplemental account rendered in *March*, 1847, it appeared, that, on the 22nd of *January*, 1847, that balance had increased to 517*l.* 2*s.* 2*d.* in his lordship's favour.

The said balance of 517*l.* 2*s.* 2*d.* also included the said cheque received of *Vines & Tomlin*. But, in these accounts, the plaintiff had not taken credit for the salary which was due to him from Lord *De L'Isle*, for his services, from *Michaelmas*, 1844, and which, according to the defendant's evidence, amounted to at least 180*l.*, at the end of 1846.

On the 20th of *February*, 1847, the plaintiff served the banking company with a notice in writing, signed

by him, demanding payment of the said balance of 128*l.* 1*s.* 10*d.*, and giving them notice that interest would be claimed from the date of such demand until the time of payment.

On the 22nd of *February*, 1847, these actions were brought.

It is agreed that the court shall be at liberty, if they shall think fit, to draw such inferences from the above facts, as a jury would have been justified in doing, or to send back the case to be amended or re-stated.

The question for the opinion of the court is, whether, upon the above facts and pleadings, the plaintiff or the defendant is entitled to the verdict on the issues joined in these actions, or either of them.

If the court shall be of opinion that the plaintiff is entitled to the verdict in the first action, then the verdict is to be entered for the plaintiff, for 128*l.* 1*s.* 10*d.*, debt, and damages equal to the interest on that sum at 5*l. per cent. per annum*, from the 20th of *February*, 1847, till judgment: but, if the court shall be of opinion that the defendant is entitled to a verdict in that action, then it is to be entered for him accordingly.

If the court shall be of opinion that the plaintiff is entitled to the verdict in the second action, on either count or breach, then the verdict is to be entered for the plaintiff, damages 40*s.*: but, if the court shall be of a contrary opinion, then the verdict is to be entered for the defendant.

First action.

J. Brown, for the plaintiff. This is an action by a customer against his bankers, to recover the balance of a banking account. It is admitted, upon the face of the case, that there is a balance; but the answer attempted to be set up, is, that that balance consists of the proceeds of a cheque which was the property of Lord *De L'Isle*, and was paid into the bank by

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the plaintiff as the agent of Lord *De L'Isle*, or was tortiously obtained by the plaintiff, and that therefore the bankers were justified in withholding it from him, under a notice from Lord *De L'Isle*. On the part of the plaintiff, it will be submitted, that the balance which is now claimed is not composed wholly of Lord *De L'Isle*'s cheque; that the cheque was not paid in as agent and on account of Lord *De L'Isle*, but on the plaintiff's own private account; that the defendants could not themselves set up the *jus tertii*, nor, by improperly disclosing the state of the plaintiff's account to a stranger, enable such stranger to interpose; and that the money in question was money lent by the plaintiff to the banking company.

The facts stated on the face of the case shew clearly that the balance in question did not consist wholly of money belonging to Lord *De L'Isle*. At the time the cheque for 180*l.* 4*s.* 8*d.* was paid in, the balance in the plaintiff's favour was 18*l.* 8*s.* 9*d.* On that cheque being cashed, therefore, the defendants were indebted to the plaintiff in the sum of 198*l.* 13*s.* 5*d.* The cheques subsequently drawn were not paid out of one part of that balance more than out of another. [*Maule*, J. The 18*l.* 8*s.* 9*d.* stands first in order of date. *Cresswell*, J. It is now settled, that money paid in by a customer to his banker, is money *lent* to the latter: *Pott* v. *Clegg* (*a*). Money paid out to the customer pays off the earlier debt; if this were not so, the earlier debt might be barred by the statute of limitations.] In *Mills* v. *Fowkes* (*b*), *Tindal*, C. J., says: "In *Peters* v. *Anderson* (*c*), where a debt was due from the defendant to the plaintiff on a covenant, and a debt on simple contract, and the defendant delivered goods in payment,

(*a*) 16 *M. & W.* 321.
(*b*) 3 *N. C.* 455. 462., 7 *Scott*, 444. 455.
(*c*) 5 *Taunt.* 596., 1 *Marsh.* 238.

without appropriating them to either debt in particular, it was held that the plaintiff might appropriate them to the debt for which he had the worse security. In *Bosanquet* v. *Wray* (*a*), it was held that a creditor receiving money without any specific appropriation by the debtor, might be permitted, in a court of law, to ascribe it to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt. These cases shew clearly that the receiver has a right to appropriate, if the payer omit to do so; and *Simson* v. *Ingham* (*b*) shews that he may make the appropriation at any time before action." It will be said that the contract under which the defendants received the money in question, was a contract made by them with the plaintiff as agent of an undisclosed principal. The facts, however, shew that this was the plaintiff's private banking account, quite independent of Lord *De L'Isle*, and opened before the plaintiff became Lord *De L'Isle*'s agent. Lord *De L'Isle* could not have drawn cheques upon this fund, mixed up as it was with the plaintiff's own moneys. *Sims* v. *Bond* (*c*) is precisely in point; it was there held, that, where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, and was received as such: and, where *A.*, as the managing owner of a vessel, was permitted by the other owners to have the possession of two warrants or orders of *The East India Company*, to pay to the said owners, or bearer, the sums of money therein mentioned, for freight, and *A.* deposited these warrants in the hands

(*a*) 6 *Taunt.* 597., 2 *Marsh.* 319.

(*b*) 2 *B. & C.* 65., 3 *D. & R.* 249.

(*c*) 5 *B. & Ad.* 389.

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of his bankers, and they received the money due on them, and gave him credit for it in account; it was held, on assumpsit brought, after *A.*'s death, by the surviving part-owners against the bankers, that, on proof of the above facts, they could not recover the money, because it was not shewn that the loan was upon their account; for, the fact of the warrants being the property of all the part-owners when placed in the bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was *A.*'s loan. Lord *Denman*, in delivering the judgment of the court, there said: "Sums which are paid to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker: *Carr* v. *Carr* (*a*); *Devaynes* v. *Noble* (*b*); and the plaintiffs, who seek to recover the balance of such an account, must prove that the *loans* were made by *them*. It is a well-established rule of law, that, where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. But, where money is lent by another, in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He cannot shew that the loan, though nominally that of another, was really intended to be his own. It was incumbent, therefore, in this case, upon the plaintiffs to prove, that, when *Charles Gribble* lent the proceeds of the freight-warrants to the defendants, and had them placed to his credit in an account kept *in his own name*, he w

(*a*) 1 *Meriv.* 541, n.

(*b*) 1 *Meriv.* 568.

and which the plaintiff had, as such agent and bailiff as aforesaid, before the accruing of any of the causes of action in the introductory part of the plea mentioned, to wit, on the 20th of *January*, 1847, paid to and deposited with the said banking company, in his own name, and without disclosing to the said company that the said baron was his principal, or that the said moneys were the proper moneys of the said baron: that the said cash balances were the proper moneys of the said baron, and that the plaintiff, at any time, had not any lien upon the said cash balances as against the said baron, nor any right to have the said cash balances, or any part thereof, paid to him, the plaintiff, by the said banking company, except as such agent of the said baron as aforesaid, and by the permission of the said baron: that, after the plaintiff had so retained and employed the said banking company as aforesaid, and whilst the said cash balances were so in the hands of the said banking company as aforesaid, and before the said drafts or orders, or either of them, were so drawn, or were so presented for payment, as in the declaration mentioned, to wit, on the 22nd of *January*, 1847, the said baron gave notice to the said banking company of all the premises in this plea mentioned, and then directed and required the said banking company to retain in their hands the said cash balances for the use of him the said baron, and not to pay or deliver the same, or any part thereof, to the plaintiff or his order; to which said request of the said baron, the said banking company then assented,—of all which premises in this plea aforesaid, the plaintiff afterwards, and before he drew the said drafts or orders in the declaration mentioned, or either of them, had notice: and that therefore the said banking company, at the several times when &c. in the declaration mentioned, did refuse to pay the said

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the attorney of the proposed lender before h by the plaintiff. The defendants here are, attempting to put the plaintiff to interplead v *De L'Isle*, which they cannot be allowed to d *son* v. *Knowles* (*a*); *James* v. *Pritchard*. (*b*) v. *Ogilby* (*c*), it was held that an insura could not, as an agent, dispute the claim o known principal for the amount of losses re him, on the ground that other persons were in the subject-matter of the insurance. *Birnie* (*d*) is to the same effect.

If the defendants had intended to rely on t the cheque having been obtained by fraud, t a matter in confession and avoidance, it ougl been specially pleaded.

Couch, for the defendants. The cheque in was paid in to the bankers' by the plaintiff, for, and to be cashed for the use of, Lord [*Cresswell*, J. And the cash to be held at t of Lord *De L'Isle*?] As agent for an principal, who, when he disclosed himself, a right to draw the money out. [*Maule*, you will contend that the plaintiff was breach of duty to Lord *De L'Isle* in a separate account in his name?] The no breach of duty, if the plaintiff onl this particular cheque for Lord *De L'I* [*Maule*, J. We all think there was a of original contract between Lord *De* banking company, — which there wou argument were tenable. You must, if some circumstances *aliundè* to excuse t

(*a*) 5 *Madd.* 47.
(*b*) 7 *M. & W.* 216.
(*c*) 9 *Price*, 269.
(*d*) 7 *E* *P.* 160.

of the cheques.] The authority of the plaintiff to receive money on Lord *De L'Isle's* account ceased on the 11th *January*, 1847, when he was informed that he was no longer to deal with his lordship's property, but to confine his services to the performance of the ordinary duties of a farming-bailiff. After his authority was so determined, he improperly received this cheque from *Vines & Tomlin*. [*Maule*, J. Were not *Vines & Tomlin* justified in treating the plaintiff as a person authorised to receive the money? Does Lord *De L'Isle* adopt it as a payment?] He is not bound to do so. [*Maule*, J. *Does* he?] No. [*Maule*, J. Then, how can the cheque, or its proceeds, be his?] Having got possession of it by means of an imposition, — for, the court may infer that he obtained it by a tacit assertion that his agency continued, — the plaintiff could acquire no title to the cheque: *Madden* v. *Kempster* (*a*); *Hardman* v. *Willcocks*. (*b*)

There was no necessity to plead the fraud; for, if the cheque was obtained by fraud, Lord *De L'Isle* had a right to interpose and say that the proceeds were money had and received by the banking company to his use. [*Maule*, J. Suppose Lord *De L'Isle* had not interposed, but the other facts could be established,— could the company have set up this defence?] Until some claim was made, they could not. [*Maule*, J. Does their right arise upon notice from Lord *De L'Isle?*] Yes. [*Maule*, J. Then, up to the time of notice, the plaintiff would have a good right of action?] The notice would relate back. [*Maule*, J. Suppose Lord *De L'Isle* had interposed during the trial, — would you say that his claim would afford the bankers any defence upon non assumpsit or nil debet?] A fact occurring since the commencement of the action could not be

(*a*) 1 *Campb.* 12. (*b*) 9 *Bingh.* 382, *a.*

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used as a defence. [*Maule*, J. It might, if it had the retrospect you mention. According to the maxim "*Omnis ratihabitio retrò trahitur, et mandato æqui paratur*," the *ratihabitio* must be prior to the fact don which is the subject of the *mandatum*. The right Lord *De L'Isle* at all events could not exist until notice The *right* would exist, but the bankers would not bound until notice. [*Maule*, J. The transaction clear would be valid, until Lord *De L'Isle* elected to clai the proceeds. The question is, what is the effect his notice.] It is submitted, that, under the circum stances, the proceeds of this cheque never was mone had and received to the use of the plaintiff, but mone had and received to the use of the person to whom i rightfully belonged. [*Maule*, J. The nature of th contract is evidenced by the account; and the form that, — the mixture of items, — negatives its being agency account.]

The second count in the second action is clearly bad the facts do not raise the duty alleged. [*Maule*, J. The probability is, that the second count is not sustain- able: but, if we think either count good, and sustained by the evidence, the defendants are to pay 40*s*.]

Brown consented to abandon the second count; and he was not called upon by the court to reply as to the other.

MAULE, J. It seems to me to be quite clear, that the account in question is a banking account of the ordinary kind, by the plaintiff, on his own account, with *The London and County Joint-Stock Banking Company*; and that it is not competent to any third party to interpose, and to say that the banking com- pany in reality contracted with him. This is plainly evidenced by the way in which the account was kept:

it was a general account, embracing as well the plaintiff's own moneys, as moneys received by him in his capacity of agent for Lord *De L'Isle*, and purporting to be an account between the plaintiff and the bankers only. As between these parties, it seems to me that the cheque was the property of the plaintiff. But, at all events, after it was turned into money, the bankers were indebted to him as for money had and received to his use, or money lent, and became liable to account to him for it whenever he chose to call for it. It was perfectly competent to Lord *De L'Isle* to allow his agent to receive money on his account, and to deal with it as if it were his own; and the evidence shews that that was the state of things before the plaintiff was told that his authority to interfere with Lord *De L'Isle*'s property was put an end to, and that he was to confine himself in future to giving orders to the men. It appears that he had before this, being duly authorised so to do, sold some corn to *Vines & Tomlin*. He might very well suppose, notwithstanding his authority as agent was to some extent recalled, that that did not prevent him from completing transactions which he had already commenced on Lord *De L'Isle*'s account. But, assuming that the plaintiff had no authority to receive this cheque, and that he received it under a tacit assertion that he *had* authority; still, having got the cheque and given it to his bankers, it seems to me that it was not competent to the bankers to say that they did not receive the money on his account, because he obtained the cheque in a wrongful manner. The result of the case, in my view, is, that the money in question was, at the time it reached their hands, money lent by the plaintiff to the banking company, or money had and received by them to his use: and it would have continued so, if Lord *De L'Isle* had not interfered. At the utmost, Lord *De L'Isle*'s rights accrued only after the

and that the circumstance that the receipt of the chec by the plaintiff might have been blameable, does afford any answer to this action. The transaction regular and lawful so far as the plaintiff and the bank were concerned: it was a simple transaction of loa and consequently I think the plaintiff is entitled recover in the first action.

As to the second action, I am of opinion that t plaintiff must have a verdict for 40*s.* upon the fir count, and that the defendant is entitled to a verdi on the second count.

Cresswell, J. I am of the same opinion. Tl account purported to be an account between the plai tiff and the banking company only: there is no pr tence for saying that Lord *De L'Isle* had anything to with it. It is said that the cheque of *Vines & Tom* was received by the plaintiff in defiance of an ord from Lord *De L'Isle* not to receive it. Assume that was: if the plaintiff had himself received the cash that cheque, and had paid the money in to his accou with the banking company, they clearly would ha been responsible to him for it: and I cannot see tl it makes the slightest difference, that, instead of doi so, he handed the cheque to the bankers to get cash they having no notice at the time they obtained t

L'Isle was dissatisfied with the state of the account
een himself and the plaintiff, and that Mr. *Glen-*
ing, at his request, intimated to the plaintiff that
as to deal no more with his lordship's property.
ay be very questionable whether the plaintiff might
airly have understood that as prohibiting him from
ng any more sales, but not from getting in money
persons to whom he had already sold corn,—
ially as he does not seem to have been asked to
r an account of the sales which he had already
ed. The case of *Hardman* v. *Willcocks* (*a*) differs
tially from this case. There, the plaintiff had ob-
d possession of the goods by a fraud between him
he insolvent, and therefore could be in no better
tion than the insolvent himself: the goods not
g in reality the plaintiff's goods, the rights of the
nees intervening, the defendant was not bound to
unt to him for the proceeds of the sale.

ILLIAMS, J. I am of the same opinion. If we
to decide otherwise, I think we should be pro-
gating a doctrine that would be found very injurious
ankers.

s to the second action, I think the second count
not disclose a cause of action. But all difficulty
that is removed by Mr. *Brown*'s concession that a
ict may be entered for the defendant as to that
t.

Judgment accordingly.

(*a*) 9 *Bingh.* 382 (*a*).

HITCHINS *v.* THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.

Feb. 16.

By the 65th section of the companies clauses consolidation act, 1845, — 8 & 9 *Vict.* *c.* 16, — it is provided that all the money raised by the company, whether by subscriptions of the shareholders, or by loan, or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special act, and all expenses incident thereto, and, secondly, in carrying the purposes of the act into execution: — Held, that the expenses of obtaining the special act were recoverable against the company in an action of *debt*.

DEBT. The first count of the declaration stated, that, before and at the time of the passing and coming into operation of *The Kilkenny and Great Southern and Western Railway* act, 1846 (*a*), and before the commencing of this suit, to wit, on the 7th of *August*, 1846, there was due to the plaintiff a large sum, to wit, 3000*l.*, for costs and expenses by the plaintiff, before the passing of the said act, incurred in obtaining the said act, and for expenses incident thereto, to wit, for the price and value of work before the passing of the said act done, and materials for the same provided, by the plaintiff, and for money by the plaintiff before the passing of the said act paid, laid out, and expended in and about obtaining the said act, and in and about divers other matters, things, and expenses necessarily incident thereto: that, after the passing and coming into operation of the said act, to wit, on the 18th of *August*, 1846, the defendants had notice of the premises, and that the said sum was so as aforesaid due to the plaintiff for costs and expenses incurred in obtaining the said act, and for expenses incident thereto: that afterwards, to wit, on the day and year last mentioned, and on divers other days and times between that day and the commencement of this suit, they, the defendants, being "*The Kilkenny and Great Southern and Western Railway Company*" in the said act men-

(*a*) 9 & 10 *Vict.* *c.* cccl x.

tioned, by virtue of the said act, and of the powers and provisions therein contained in that behalf, raised and received divers sums of money, amounting in the whole to a large sum, to wit, 20,000*l.*, being more than sufficient to pay and satisfy all the costs and expenses incurred in obtaining the said act, and all expenses incident thereto,—and of which said sums so raised and received by the defendants as aforesaid they the defendants, at the time of the making of the request by the plaintiff hereinafter next mentioned, had in their hands a large sum, to wit, 5000*l.*, out of which the defendants could and might and ought to have paid and satisfied the plaintiff the said sum so due to him as foresaid, to wit, the said sum of 3000*l.*: that thereupon it became and was the duty of the defendants, out of the said sums of money so raised and received by them as foresaid, to pay to the plaintiff the said sum so due to him as aforesaid, and the defendants, after the said sums of money had been by the defendants so raised and received as aforesaid, to wit, on the 1st of *July*, 1847, were requested by the plaintiff to pay him the said sum so due to him as aforesaid: Yet that the defendants did not then apply, nor had they ever in any manner whatsoever applied, the said sums of money so by them raised and received as aforesaid, or any part thereof, in or towards paying or discharging the said sum so due to the plaintiff as aforesaid; and that thereby, and by reason of the non-payment of the said sum, an action had accrued, &c.

Special demurrer.

To this count the defendants demurred specially, assigning for causes,—that the said first count discloses no ground or cause of action upon which the defendants are liable to be sued, inasmuch as there is no statute which casts any duty or liability upon them, as a company, and in a corporate capacity, to pay the moneys sought to be recovered by the first count, out of the first

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moneys coming to their hands, as alleged in the first count; — that it appears by the said first count, that no legal claim existed against any person before the passing of the said act in the first count of the declaration mentioned, in respect of the claims and causes of action in that count mentioned, inasmuch as it does not appear in and by the first count that the said work and labour therein mentioned was done or bestowed, or the said money paid, by or in consequence of any request from any one, or in any wise on the contract of the defendants, and the said act of parliament does not give the plaintiff any claim against the defendants which the plaintiff had not before against some individual; — that the said first count discloses no privity of contract between the plaintiff and the said company, and it is not shewn therein that the debts therein mentioned were contracted at the request of the defendants; — that, if the said first count is based upon any statute, such statute should have been followed, and the specific remedy therein provided should have been adopted; — that the said first count discloses (if any cause of action whatever) a common law duty, and a breach of it, for which an action on the case ought to have been brought; — that the said first count should have shewn that the works therein mentioned, and the money therein stated to have been paid by the plaintiff for the said company, were done and performed and paid respectively at the request of the said company; — and that, if the plaintiff complains of a misapplication of the funds of the company, such complaint is properly a ground for an action on the case, and not for an action of debt.

The plaintiff joined in demurrer.

Pearson, in support of the demurrer. The first count is clearly bad. It does not allege that any money was

ie to the plaintiff upon any contract before the passing the act: every word contained in the declaration ay be perfectly true, and yet the plaintiff may have cause of action against the company. The money imed may be due from somebody other than the mpany. Reliance will be placed, on the part of the iintiff, upon the 65th section of the companies clauses nsolidation act, 1845,—8 & 9 *Vict. c.* 16,—which ovides "that all the money raised by the company, ether by subscriptions of the shareholders, or by n, or otherwise, shall be applied, firstly, in paying costs and expenses incurred in obtaining the special and all expenses incident thereto, and, secondly, in rying the purposes of the company into execution." the plaintiff complains of any misapplication of the ads collected by the company, the proper remedy uld have been by an action upon the case: *Cane* v. *apman* (*a*); *Wilkes* v. *The Hungerford Market Comny* (*b*); *Wells* v. *Iggulden* (*c*); *Moore* v. *The Metrolitan Sewage Manure Company.* (*d*) [*Williams*, J. ow do you distinguish *Carden* v. *The General Cemery Company* (*e*) from the present case?] There, the iestion arose, not on demurrer to the declaration, but the plea: and it arose under a statute which coninued no clause similar to the 142nd section of the act ow under consideration, which enacts, that, "in all ses where any damages, costs, or expenses, are by is or the special act, or any act incorporated therith, directed to be paid, and the method of ascertaing the amount or enforcing the payment thereof is not ovided for, such amount, in case of dispute, shall be

(a) 5 *Ad. & E.* 647., 1 *N. P.* 104.

(b) 2 *N. C.* 281., 2 *Scott*, 46.

(c) 3 *B. & C.* 186., 5 *D. & R.* 13.

(d) 3 *Exch.* 333., 18 *Law Journ., N. S., Exch.* 164.

(e) 5 *N. C.* 253., 7 *Scott*, 97.

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ascertained and determined by two justices; and, if the amount so ascertained be not paid by the company, other party liable to pay the same, within seven days after demand, the amount may be recovered by distress of the goods of the company or other party liable as aforesaid: and the justices by whom the same shall have been ordered to be paid, or either of them, on application, shall issue their or his warrant accordingly." The plaintiff's remedy was under that clause: *Crisp* v. *Bunbury*. (a)

Unthank, contrà. This is not a case in which the justices have any jurisdiction. The act contemplates several things, amongst others, the ascertainment of the amount of the expenses, and that moneys have come to the hands of the company,—which could not be inquired into by justices. The 142nd section, therefore, has no application to a debt in respect of services rendered in relation to the formation of the company. The general point is settled by *Tilson* v. *The Warwick Gas-Light Company* (b) and *Carden* v. *The General Cemetery Company*. (c) In the former, an act of parliament for incorporating a gas-light company enacted that all the costs of obtaining the act should be paid and discharged out of the moneys subscribed, in preference to all other payments; and it was held, that the attorneys who obtained the act might maintain an action of debt, founded upon the statute, for their costs. And in the latter, by the act incorporating the company, they were to apply the first moneys received under the act in discharge of expenses incurred in obtaining the act; and it was held, that the plaintiff, though a member of the

(a) 8 *Bingh.* 394., 1 *M. & Scott*, 646. And see *The King* v. *The Trustees of the Mildenhall Savings Bank*, 6 *Ad. & E.* 952.

(b) 4 *B. & C.* 962., 7 *D. & R.* 376.

(c) 5 *N. C.* 253. 7 *Scott*, 97.

ompany, might sue them (in indebitatus assumpsit) or his time and trouble, and money expended, in obaining the act. The judgment of the court in the itter case is quite decisive.

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MAULE, J. We all think it is impossible to disinguish this case from *Tilson* v. *The Warwick Gas-Light Company*, and *Carden* v. *The General Cemetery Company*.

Judgment for the plaintiff.

YATES and Others, Assignees of SAMUEL SEAL, a Bankrupt, *v.* HOPPE.

Feb. 13.

Where money is paid by *A.* to *B.*, to be applied by the latter pursuant to a binding contract between the parties, *A.* cannot revoke its destination.

A., the drawer of an accommodation bill, a few days before its maturity, handed over money to *B.*, the acceptor, for the purpose of meeting the bill. A *fiat* having been issued against *A.* between the day of such deposit and the maturity and payment of the bill: — Held, that, the money having been handed over to *B.* in pursuance of a binding contract, upon a good consideration, *viz.* an implied contract of indemnity, the bankruptcy of *B.* was no revocation of *A.*'s authority to apply the money in satisfaction of the bill; and consequently that *B.*'s assignees could not recover it back from him in an action for money had and received to their use.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiffs as assignees of *Samuel Seal*, after the bankruptcy of *Seal*.

The defendant pleaded, except as to 3*l.* 5*s.* 5*d.*, non assumpsit, and as to that sum, payment into court.

The plaintiffs joined issue on the first plea, and as to the 3*l.* 5*s.* 5*d.*, accepted it in satisfaction *pro tanto*.

The cause was tried before *Cresswell*, J., at the first sitting in *London* in *Michaelmas* Term last. It appeared that the action was brought to recover a sum of 200*l.*, which was handed by the bankrupt, a few days before the issuing of a *fiat* against him, to the defendant,

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for the purpose of enabling the latter to take up a bill for 196*l.* 14*s.* 7*d.*, which he had accepted for the bankrupt's accommodation. The examination of the defendant before the commissioner, which was put in, shewed that the bankrupt had brought the 200*l.* to him in bank-notes on the 15th or 16th of *March*, 18[illegible], and that the defendant paid the bill when presented at its maturity on the 23rd of the same month, with the same notes which had been handed to him by the bankrupt.

The *fiat* against *Seal* was issued on the 21st of *March*.

The learned judge left it to the jury to say,—first, whether the payment by the bankrupt to the defendant was a voluntary payment,—secondly, whether it was made in contemplation of bankruptcy,—thirdly, whether it was intended as a payment, or whether the money was delivered to the defendant merely as a stakeholder, to hand it over to the person who might be entitled to receive it as holder of the bill.

The jury found,—first, that the payment was voluntary,—secondly, that it was *not* made in contemplation of bankruptcy,—thirdly, that the money was delivered to the defendant for the purpose of being kept by him until the bill arrived at maturity, and of being then paid over to the person who might present the bill.

The learned judge thereupon directed a verdict to be entered for the plaintiffs, reserving leave to the defendant to move to set it aside, and enter a verdict for him, if the court should be of opinion that the above state of facts, and the finding of the jury thereon, entitled him to do so.

Byles, Serjt., in the same term, obtained a rule accordingly.

H. Mills now shewed cause. The authority of

:fendant to apply this money in satisfaction of the ll, was revoked by the intervening bankruptcy of the awer, and the money became from that moment the operty of the assignees. Where money is placed in e hands of an agent for the purpose of being paid er, it remains until it is paid over the property of the positor, and the authority of the agent is revocable any time; and the acceptor of an accommodation ll has no greater authority in this respect than an dinary agent: *Williams* v. *Everett* (*a*); *Wedlake* v. *urley* (*b*); *Toovey* v. *Milne*(*c*); *Simpson* v. *Sikes* (*d*); *oore* v. *Barthrop* (*e*). It was contended, on moving r this rule, that the money in question was paid purant to a contract between the bankrupt and the dendant, to apply it to the purpose for which it was ft with the defendant, and therefore that the payment as irrevocable, inasmuch as it was made pursuant to an thority which was coupled with an interest. There as no evidence of any such contract, and no principle f law to warrant that position. What is the contract hich the drawer of an accommodation bill enters to with the acceptor? It is an open contract of demnity: *Reynolds* v. *Doyle* (*g*): and see the preedents in 2 *Chitty* on Pleading, 7th edit., p. 232, *earson* on Pleading, 134. To give a man an authoty coupled with an interest, there must be a good nsideration existing at the time: *Walsh* v. *Whitmb* (*h*); *Gaussen* v. *Morton* (*i*); *Smart* v. *Sandars* (*k*). he only exception, if it be one, is, where the authority as been assented to by all parties. In *Walker* v. *ostron* (*l*), the plaintiff sold goods to *B.*, taking his

(*a*) 14 *East*, 582.
(*b*) 1 *C. & J.* 83.
(*c*) 2 *B. & Ald.* 683.
(*d*) 6 *M. & Selw.* 295.
(*e*) 1 *B. & C.* 5., 2 *D. & R.* 25.
(*g*) 1 *M. & G.* 753, 2 *Scott*, *R.* 45.
(*h*) 2 *Esp. N. P. C.* 565.
(*i*) 10 *B. & C.* 731, 5 *M. & R.* 613.
(*k*) *Antè*, Vol. V. p. 895.
(*l*) 9 *M. & W.* 411.

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acceptances for the price, and sent them to the defendant as *B.*'s agent, who consigned them to his partners abroad for sale. While the acceptances were running, the plaintiff, doubting *B.*'s solvency, required further security; whereupon it was agreed between the plaintiff, and *B.*, and the defendant, that *B.* should write and deliver to the defendant a letter authorising him out of any remittances he might receive against the net proceeds of the above consignments, to pay the acceptances as they became due, if not honoured by him, *B.*, previously to the receipt of such net proceeds. The letter was accordingly delivered to the defendant, and he assented to the terms of it. Before the bills were due, *B.* became bankrupt, and the defendant, having received the net proceeds of the goods, refused to pay any part thereof to the plaintiff, but handed them over to *B.*'s assignees. It was held, that the plaintiff was entitled to recover the amount of the acceptances from the defendant, in an action for money had and received; this being an appropriation irrevocable except by the consent of all parties, for which the existing debt, although not then payable, was a good consideration. Here, however, there was no consideration: there was no debt due from the bankrupt to the defendant during the currency of the bill, but a mere possibility of contingent damage. [*Williams*, J. After depositing the money with the defendant, was *Seal* any longer under any duty to indemnify the defendant?] If the view of the contract presented by the plaintiffs be correct, clearly not. [*Williams*, J. What plea would you plead, to a declaration against him for not indemnifying?] A special plea setting out all the circumstances. [*Talfourd*, J. You say he could not plead that he *had* indemnified the acceptor? Precisely so. The jury have found as a fact that the bankrupt had no intention that the defendant should

y other interest in the money than that of an ordi-
ry stakeholder. [*Maule*, J. It is quite clear that
e payment was not meant as a payment out and out
der all circumstances; for instance, the defendant
uld have had no right to retain the money, if he was
ver called upon to pay the bill at all. The money
s to be paid over on the bill being presented. The
estion is, whether this appropriation of the money was
ocable.] The mere coincidence of authority and
erest will not make that irrevocable which would
herwise have been revocable. *Humphries* v. *Wil-*
n (*a*) is substantially this case: there, *A.*, shortly
fore his bankruptcy, on being applied to by *B.*, to
hom he owed 47*l.*, to pay the debt, gave him a bill of
change to get it discounted, to pay his own debt, and
y over the surplus: before the bill was discounted,
became bankrupt; and it was held that *B.* could
t retain the bill against the assignees. So, in *Bucha-*
n v. *Findlay* (*b*), *A.* & Co., merchants at *Liverpool*,
itted a bill to *B.* & Co. in *London*, with directions
et it discounted, and apply the proceeds in a par-
lar way. *B.* & Co. did not get the bill discounted,
received the money when it became due. Before
time, *A.* & Co. had stopped payment, and de-
to have the bill returned to them. A commission
nkruptcy having been issued against them before
money was received on the bill by *B.* & Co.,—it
held, that the latter were liable to be sued for the
nt by the assignees of *A.* & Co., as money re-
ed to their use; and that *B.* & Co. could not set
debt due to them from *A.* & Co. Here, the
ndant was merely an agent to pay the bill: *Reay*
Packwood (*c*). *Guthrie* v. *Crossley* (*d*) differs from
present case in some of its circumstances: there,

(a) 2 *Stark. N. P. C.* 566.
(b) 9 *B. & C.* 738, 4 *M. & R.* 593.
(c) 7 *Ad. & E.* 917.
(d) 2 *C. & P.* 301.

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there was no intervening bankruptcy; and the case went off on the ground of fraudulent preference: money was not sent for the specific purpose of meeting the bills which the defendant had accepted for the accommodation of the bankrupt, but generally "to help him over his payments." That case was followed by a case of *Abbott* v. *Lawrence*, cited in *Abbott* v. *Pomfret* (*a*), which also went off on the ground of fraudulent preference. The payment here was voluntary and without consideration: there was no subsisting debt; and, if there had been, the defendant could not avail himself of mutual credit as a defence under non assumpsit: *Wood* v. *Smith* (*b*); *Pearson* on Pleading, 393. [*Maule*, J. That surely cannot be so.]

Byles, Serjt., in support of the rule. The jury having disposed of the question of fraudulent preference, it is now sought to get rid of the effect of their finding, by saying that the payment by the bankrupt to the defendant was revocable. It is submitted, however, that that argument cannot be sustained,—first, because the payment was made in pursuance of the bankrupt's implied undertaking to indemnify the defendant against the consequences of his acceptance: and, further, it is submitted, that, even if there were no such implied undertaking, a new contract arose upon a sufficient consideration; and that, when the defendant obtained possession of the money, he became an acceptor for value. The first ground, however, will suffice to dispose of the case. The contract into which the drawer of an accommodation bill enters with the acceptor, is, that he will provide funds to meet the bill, or take it up himself, or indemnify the acceptor against the consequences of his omission to do so. The declaration in *Reynolds* v. *Doyle* (*c*) was framed upon a

(*a*) 1 *N. C.* 462, 1 *Scott*, 470.
(*b*) 4 *M. & W.* 522.
(*c*) 1 *M. & G.* 753, 2 *Scott. N. R.* 45.

breach of the contract to indemnify. That case shews that the drawer's contract is, to do that which an ordinary acceptor for value is bound to do. If the bill is made payable at a particular place, as between the drawer and the accommodation acceptor, the latter is not bound to have the money there, but the former is; and, if he has it there, it is in pursuance of his original contract. In *Young* v. *Hockley* (*a*), the declaration, *in assumpsit* by an accommodation acceptor against the drawer, alleged the promise to be, that the defendant "would pay the said bill, or supply the plaintiffs with property for payment thereof, when it became due, and would indemnify and save the plaintiffs harmless against all costs, charges, and expenses which they would sustain by reason of their acceptance thereof." That is the true contract which the drawer enters into. This payment, therefore, was a payment made by the bankrupt in pursuance of his original liability: it was not even a premature payment. [*Williams*, J. Suppose there had been no bankruptcy, and, the bill being due, the accommodation acceptor omits to apply the money in payment of it, and afterwards is sued upon it, and pays the amount, and the costs of the action, and afterwards sues the drawer upon the contract of indemnity,—how would you set up the previous payment?] By alleging, that, before breach, a new contract was entered into between the parties, by which the drawer was discharged. [*Maule*, J. Probably it might be said in that case that there was no promise to indemnify.] If so, the answer would arise on non assumpsit, or a traverse of the damnification. The matter, however, has been decided. Lord *Ellenborough*, in *Willis* v. *Freeman* (*b*), says: "The case of *Wilkins* v. *Casey* (*c*) has established, that, if a

(*a*) 3 *Wils.* 346.
(*b*) 12 *East*, 656, 659.
(*c*) 7 *T. R.* 711.

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man who has funds in his hands belonging to a trader, who has committed a secret act of bankruptcy, accepts a bill for that trader, without knowing of such act of bankruptcy, he may apply those funds, when the bill becomes due, to the discharge of his own acceptance, though a commission of bankruptcy may have issued in the interim, and will be protected against any claim the assignees may afterwards make upon him in respect of the funds so applied." [*Maule*, J. At all events, it is mutual credit.] In *Madden* v. *Kempster* (*a*), it was ruled by Lord *Ellenborough*, that, if *A.* is under acceptance to *B.*, he may retain money of *B.'s* in his hands to discharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity against being sued upon it. In *Morse* v. *Williams* (*b*), it was held, that, where a sum of money has been lodged with a party, to indemnify him against bills of exchange he has accepted for the accommodation of another, an action will not lie against him to recover the money while the bills are outstanding, although the statute of limitations has run upon them. [*Cresswell*, J. I feel a difficulty in discovering a consideration for the new contract which you rely on. That matter was a good deal discussed in *Walker* v. *Rostron* (*c*).]

MAULE, J. This is an action for money had and received, brought by the assignees of a bankrupt to recover a sum of money paid by the bankrupt to the defendant before the bankruptcy. The payment, appears, was made voluntarily, but not in contemplation of bankruptcy, and was for the purpose of enabling the defendant to take up a bill which he had accepted for the bankrupt's accommodation. Under these circumstances, the case seems to reduce itself to the question as if the action were brought by the bank

(*a*) 1 *Campb.* 12.
(*b*) 3 *Campb.* 418.
(*c*) 9 *M. & W.* 411.

himself. The circumstances under which the money was paid were these:—The defendant had, at the request, and for the accommodation, of the bankrupt, accepted a bill for 196*l.* 14*s.* 7*d.* It does not appear that there was any special agreement between the parties: but it is clear that there is an implied contract in all these cases, that the person for whose accommodation the acceptance is given shall provide for the bill, or in some way take care that the acceptor shall not be damnified by his acceptance. That is the situation in which this bankrupt stood to the defendant. The bill being within a few days of its maturity, the bankrupt handed to the defendant a sum of money, which the jury find was handed over for the express purpose of taking up the bill when it should be presented for payment. The question is, whether the bankrupt could have revoked that destination of the money, and could have called upon the defendant to return it to him. The ground upon which the defendant contends that he could not, is, that the contract affords a defence: and it seems to me that it does, because the drawer of the bill, being under an obligation, not specifically to provide funds at a particular time to meet the bill, but one which might be performed in the whole or in part by doing so, adopts a reasonable and usual course for that purpose, by providing the acceptor beforehand with a sum of money to be applied to the payment of the bill. An act done in performance of a binding contract is not revocable. The acceptance of the bill was a good consideration for the contract to indemnify. An ordinary mode of indemnification is, to provide funds to meet the bill. That mode the drawer has adopted. In ordinary cases, where a man is bound to pay money on or before a given day, a payment made before the day is not revocable. This is a case of that nature: the drawer, by handing to the acceptor the sum necessary to meet the bill, discharged

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himself by performance of his contract. As he could not have recalled the payment, so neither can his assignees. The money clearly never was money had and received by the defendant to their use; and, consequently, the rule to enter the verdict for the defendant must be made absolute.

CRESSWELL, J. The case is to be considered quite independently of the bankruptcy of *Seal*, the jury having found that the payment, though made voluntarily, was not made in contemplation of bankruptcy. The bankrupt could not, I apprehend, have recovered back the money. *Walker* v. *Rostron* was a totally different case from this. The acceptance of the bill by the defendant was ample consideration for the bankrupt's promise to indemnify him, in any of the ordinary modes of indemnification. The payment was, therefore, a payment made in pursuance of a promise made upon good consideration; and the bankrupt could not revoke it. His assignees, therefore, have no claim.

WILLIAMS, J. The bankrupt was under an impl contract, founded upon a good consideration, to ind nify the defendant against the consequences o acceptance. He elected the mode of performin contract, by providing funds to meet the bill. not competent to him afterwards to recall that s claim the money.

TALFOURD, J. Lord *Abinger's* judgment i v. *Rostron* in principle decides this case. B over the money to the defendant, the ba taking lawful means to perform his contract not retrace his steps: and his assignees ca better situation.

Rul

END OF HILARY VACATION

CASES

ARGUED AND DETERMINED

1850.

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term,

IN THE

THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO SAT *IN BANCO* DURING THIS TERM, WERE—
WILDE, C. J., CRESSWELL, J., WILLIAMS, J., AND TALFOURD, J.

MARSH *v.* HIGGINS and Another.

April 25.

Clear and unambiguous words are necessary to give a retrospective effect to an act of parliament, so as to deprive a party of a vested right of action.

THIS was an action of assumpsit by the indorsee against the acceptors of a bill of exchange.

The defendants pleaded,—first, a traverse of the indorsement by the payees to the plaintiffs. Secondly—

The 225th section of the 12 & 13 *Vict. c.* 106, enacts, "that no such deed or memorandum of arrangement (as mentioned in *s.* 224) shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of *three months* (calendar, by the interpretation clause, *s.* 276) from the time at which such creditor shall have had *notice from such trader*, of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid:"—

Held, that this clause is not to be construed retrospectively, so as to deprive the creditor of his right to continue an action duly commenced by him before the act came into operation.

Held also, that an intimation to a creditor, from one of the trustees named

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that, before the commencement of this suit, to wit, on the 1st of *November*, 1847, by an indenture then made between the defendants of the first part, *Charles Groves* and *Joseph Fry* of the second part, and the several other persons, creditors of, or claimants for damages against, the said parties of the first part, to wit, the defendants, who, by themselves or their agents should subscribe and affix their names and seals, or otherwise assent to the said indenture, of the third part; and which said indenture was at the time of the making thereof, and is, sealed with the respective seals of the defendants, and which said indenture has never been, and is not now, in the possession, custody, or power of the defendants, or either of them, and which they cannot produce to the court here,—reciting that the defendants were indebted to, or admitted claims for damages due to, the several parties thereto of the third part, and were then unable to pay those debts and claims; and that, at a meeting of their creditors, then recently held, it was agreed and determined that the defendants should execute an assignment of all their estate and effects for the benefit of, and receive a general release from, their creditors and claimants, provision being made, as a primary trust of such assignment, for the discharge of the claims of the three parties in the said indenture after-named, on the principle and in the manner thereinafter declared, *viz.* *The Coalbrook-Dale Iron Company*, Messrs. *Blockow & Vaughan*, and Mr. *James Batson*, having respectively

in the deed, that such a deed had been executed by the majority of the creditors, accompanied by a request to him to sign it, was sufficient evidence of notice, without the production of the deed itself.

A plea under this section contained an averment that "*three months* from the time at which the plaintiff had notice from the defendants of their suspension of payment, and of the deed, expired before the commencement of this suit:"—Held (the plaintiff having pleaded over), that this must be taken to mean three *calendar* months.

claims upon the said defendants for damages for non-performance of contracts made with them by the said defendants for the purchase of iron, it was agreed that the said three above-named parties in manner therein-mentioned (which is not material here to set forth); and that, in and by the said indenture, in pursuance of the said first-mentioned agreement, they, the said defendants, by the direction and on the nomination of the parties thereto of the third part, testified by their severally executing or assenting to the said indenture, did thereby assign unto the said *Charles Groves* and *Joseph Fry*, their executors, administrators, and assigns, all and singular the household goods, books, furniture, stock in trade, bonds, bills, money, and securities for money, debts, and credits, and all other the personal estate and effects belonging or owing to them the said defendants, and each of them, and in particular a certain right of action and suit against *The National Exchange Company*, and certain damages to be recovered against the said *National Exchange Company* (save and excepting out of the said assignment the necessary wearing apparel of them the said defendants respectively, and their respective families), and all the right and title, possession, property, claim, and demand whatsoever, at law and in equity, of the said defendants, and of each of them, into, out of, or upon the said premises respectively, together with all books, accounts, writings, bills, notes, and receipts, papers, and vouchers touching the same, or any part thereof,—To have, receive, and take the said goods, chattels, stocks, moneys, securities for money, bonds, bills, and all and singular other the premises intended to be thereby assigned, unto the said *Charles Groves* and *Joseph Fry*, their executors, administrators, and assigns, upon certain trusts in the said indenture expressed, that is to say, upon trust to get in the estate in manner therein mentioned; and, after

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making certain payments in the said indenture mentioned, then upon trust that the said trustees should apply all the moneys which should be received under or by virtue of the trusts of the said indenture, in payment of all the debts and sums of money which should be owing by the said defendants to such of their creditors (save and except the said *Coalbrook-Dale Iron Company*, and the said Messrs. *Blockow & Vaughan*, and the said *James Batson*,) therein named as should have executed the said indenture, rateably and in proportion to the amount of their respective debts, without priority or preference of any one or more of them over the others, or any other of them, until each of the same creditors, or his, her, or their executors or administrators, should have received the full amount of the debt due to him or her respectively; and should assign, pay, and apply the residue and surplus, if any, of the said trust estate, moneys, and premises, to the said defendants, their executors, administrators, or assigns, for their own proper use and benefit, or as they should direct: That it was thereby declared and agreed that it should be lawful for the said trustee or trustees, if they should think proper, but not otherwise, to pay to all or any creditors of the said defendants whose claims respectively should not exceed the sum of 10*l.*, the full amount of such claims respectively, so as to supersede the necessity of their being parties to the said indenture: That, in and by the said indenture, in consideration of the assignment and covenant therein contained, and of other the premises, the said several creditors and claimants parties thereto, did thereby, for themselves severally, and for their respective heirs, executors, and administrators, covenant with the said defendants, their executors and administrators, that they, the respective covenantors, or their respective heirs, executors, administrators, or assigns, should and would not, at any

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eafter, sue, implead, or attach the said defend-
either of them, their, or either of their heirs,
, or administrators, estate or effects, for or by
on account of any debt, damages, claim, or
then owing, or claimed to be owing, by the
ndants to the covenantors respectively; and,
e covenantors, or any of them, should act con-
heir covenant therein-before contained, being
covenant, and the true intent of the said in-
then the said defendants, their heirs, executors,
istrators, should and might plead the said
as a general release in bar of all or any such
uits, or attachments (*a*): That, before and at
of making and entering into the said deed, the
s were traders liable to become bankrupts
laws then in force relating to bankrupts, and
e meaning of the statute hereinafter men-
That the said deed was signed and executed by
half of more than six sevenths, to wit, by
irteenths, in number and value of those
whose debts amounted to 10*l.* and upwards,
g every creditor a creditor in value in respect
nount only as upon an account fairly stated,
wing the value of mortgaged property and
h available securities or liens from the defend-
ither of them, would appear to be the balance
n,—that is to say, the said deed was signed and
a great many respectively of the said creditors,
signed and sealed on behalf of the residue of
creditors, the said residue being, to wit, one
and the said creditors by whom and on
whom the said indenture was so signed and
thereby assented to the said indenture, and
nd thereby: That, at the time of the making

Vide Gibbons v. *Vouillon, antè*, Vol. VIII. p. 483.

same, and being still, in force) the said deed then became, and had thence continued, and was, effectual and obligatory in all respects on the said creditors by whom and on behalf of whom it was signed as aforesaid, and upon the plaintiff as such creditor of the defendants, and as effectual and obligatory in all respects upon and against the plaintiff as if he had duly executed and signed the same: That the trustees in the said deed named accepted the said trusts thereof, and had at all times acted in performance of the same: And that, by reason of the premises respectively, the defendants, before the commencement of this suit, became and were released from the said claims and demands of their said creditors by whom and on behalf of whom the said deed was so signed.

To the second plea, the plaintiff replied that he had no notice of the deed,—upon which issue was joined.

The writ was issued on the 2nd of *July*, 1849: the declaration was delivered on the 8th of *August*, and the defendants pleaded on the 1st of *November* in the same year. The statute 12 & 13 *Vict. c.* 106, upon which the second plea was framed, received the royal assent on the 1st of *August*, 1849, and came into general operation on the 11th of *October*, 1849.

The cause was tried before *Wilde*, C. J., at the sittings in *London* after last *Hilary* Term. In order to prove that the plaintiff had notice of the defendants' suspension of payment, and of the deed of arrangement mentioned in the second plea, the defendants called *Joseph Fry*, one of the trustees. He stated that he had two interviews with the plaintiff upon the subject,—the one on the 6th, the other on the 26th of *January*, 1848; that, upon both occasions, he held in his hand the document which he held in his hand at the time of giving evidence (and which was represented to be the deed of arrangement mentioned in the plea), but that

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he did not read it to the plaintiff, but merely told him shortly what was the nature of its provisions, asking him to sign it, which he declined to do; that, at the first interview, the plaintiff admitted that he was aware that the defendants had suspended payment; and that, upon the second occasion he, the witness, told the plaintiff that the deed had been executed by nearly all the creditors.

The deed was not produced.

On the part of the plaintiff, it was submitted that there was no evidence at all to support the second issue; for, that, to constitute the conversations deposed to notice of the deed, the deed ought to have been produced; and, further, that the plea, if proved, afforded no answer to the action.

A verdict was found for the plaintiff on the first issue, and for the defendants on the second; and leave was reserved to the plaintiff to move to enter the verdict for him on the second issue, or for judgment *non obstante veredicto.*

Keating, on a former day in this term, moved accordingly. If the defendants meant to rely upon *Fry's* evidence as proof that the plaintiff had notice of the deed, the deed itself ought to have been produced, otherwise there was nothing to show that the instrument set out in the plea was the same as that which formed the subject of the alleged conversations. [*Cresswell*, J. Upon an issue upon notice of dishonour of a bill, is it necessary to produce the bill?] The plaintiff's admission at the most amounts to this,—I know that *a deed* has been prepared, and that it is executed by certain creditors: but that does not shew that the plaintiff had the notice which this act of parliament requires. The issue was upon the defendants; they were bound to put in the deed.

The plea is clearly a bad plea. The 224th section of the 12th & 13th *Vict. c.* 106, enacts, "that every deed or memorandum of arrangement *now* or *hereafter* entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same: and such deed or memorandum, when so signed, shall not be, or be liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section then provides, "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of *three months* from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within *such time* obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for

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the court, within the district of which the trader have resided or carried on business for six mc next immediately preceding his suspension of payn to make such order or certificate on the petition of such trader, and to exercise jurisdiction in and the matters of any such application; and no cre who shall not have had fourteen days' notice of intended application for such order or certificat aforesaid, shall be bound thereby." The notice templated by this section must be a notice un and given subsequently to, the passing of the act. legislature clearly could not have intended to re valid a *previous* notice. That which is relied on notice here, took place on the 6th, or the 26th *January*, 1848. It could have no effect whatever u the act passed; and the act did not come into op tion until the 11th of *October*, 1849, which was a the commencement of the action, and after issue joi The notice clearly was intended to be prospect consequently, the plea is bad. [*Cresswell*, J. ' 224th section is prospective.] The 225th cannot, any fair intendment, be so construed. The ple also bad for not alleging that three *calendar* mo had elapsed: three *lunar* months' notice would no sufficient. [*Talfourd*, J. May we not read that all tion by the light afforded by the interpretation cla section 276, which enacts that the term "month" s mean a calendar month?] The court cannot look at interpretation clause to construe the plea. [*Cresswell* The objection might be good on special demurrer; b after pleading over, we must assume that the jud properly told the jury that the notice must be a th calendar months' notice.]

WILDE, C. J. This rule is moved on two grounds,- first, to enter a verdict for the plaintiff on the secon

issue, which is joined upon the question whether or not the plaintiff had *notice* of the deed referred to in the second plea,—secondly, to enter a verdict for the plaintiff on the second issue *non obstante veredicto*, on the ground that the plea, if proved, is no answer to the action.

Upon the first point, it is material to see what deed it is that the creditors are bound by, and then to consider whether or not the plaintiff had notice of that deed. By the 224th section, it appears that it is not any particular description of deed that is to be binding upon the creditors, but that a deed of any kind, "signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching the trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto," shall, subject to the conditions thereinafter mentioned, be effectual and obligatory upon all the creditors. What are those conditions? Having already provided that a deed of the nature before mentioned, and signed as above, shall bind the creditors, the legislature proceed, in section 225, to enact, "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of *such* majority of the creditors as aforesaid." Now, what was the notice here? The witness says, I held the deed in my hand,

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and told the plaintiff that it was a deed of arrangement between Messrs. *Higgins* and their creditors, and that it was signed by nearly all the creditors. (*a*) Suppose such a notice had been served upon the plaintiff *in writing*, I apprehend it would have been a perfectly good notice, and would call upon the plaintiff to inform himself whether or not the deed was such one as the statute contemplated. The plaintiff might have read the deed. I remember a case where an arbitrator had locked himself in a room in order to prevent his being served with a deed of revocation of his authority; and Lord *Tenterden* told the jury, that, if the arbitrator had the means of knowledge, but wilfully abstained from acquiring it, it was the same as if he had been duly served. So, here, it is the same as if the creditor had said,—"It is immaterial what the nature of the deed may be; I will not execute it." For these reasons, I am of opinion that there should be no rule upon the first point. As to the motion to enter judgment *non obstante veredicto*, the rule may go.

CRESSWELL, J. I agree with my lord that there is no ground for disturbing the finding of the jury upon the second issue. The plea sets out a deed of arrangement, with an averment that the plaintiff had notice of it. The plaintiff, by his replication, merely traverses that he had notice of the deed. The evidence is, that he had notice of a deed, which, as far as the statement shews, corresponds with that stated in the plea. There is no suggestion that there was any other deed, in order to raise any ambiguity. I therefore think the evidence sufficient. The other branch of the motion,

(*a*) *Quære*, whether a notice that "nearly all the creditors" had signed the deed, amounted to notice that "six sevenths in number and value of those creditors whose debts amounted to 10*l.* and upwards" had executed it?

as to the validity of the plea, raises a question that is well worthy of consideration.

The rest of the court concurring, a rule *nisi* was granted to enter judgment *non obstante veredicto* on the second issue.

Byles, Serjt., and *Aspland*, shewed cause. The main question is, whether the 12 & 13 *Vict.*, which came into operation *after* the commencement of the action, but *before* plea pleaded, is applicable to this case? The 224th section, upon which this plea is founded, clearly applies to past deeds: it speaks of "every deed or memorandum of arrangement *now* or *hereafter* entered into." That is the substance of the thing: the notice is a mere incident. The 226th, 227th, 228th, and 229th sections also clearly are retrospective as well as prospective. Where the provision is intended to be prospective only,—as in *ss.* 135, 136, 137,—the words "after the commencement of this act" are used. Section 201 is both prospective and retrospective in its language. The 211th and following sections are prospective only. There is no clause providing that the act shall be construed beneficially for creditors. [*Wilde*, C. J. I do not wonder at the omission; for, many judges have said that they did not know what it meant.] There can be no hardship in putting such a construction upon the act, which was intended to favour these arrangements, as will deprive a hostile creditor of the power of harassing his debtor. [*Wilde*, C. J. To justify us in construing a statute to be retrospective, the words must be very explicit.] That, no doubt, is the general rule, as is laid down in *Moon* v. *Durden* (*a*), where it is said that "the general rule, in construing recent statutes,

(*a*) 2 *Exch.* 22.

plea must, at all events after verdict, be read with the aid of the interpretation clause, and therefore means "calendar month." Reading it with the context, even without the aid of the interpretation clause, it must be so intended: *Titus* v. *Lady Preston* (*a*); *Lang* v. *Gale* (*b*); *Cockell* v. *Gray* (*c*). [*Cresswell*, J. All the cases on the subject are considered in *Simpson* v. *Margitson* (*d*).] Where the opposite party has pleaded over, and the pleading is capable of a construction which will support it, the court will give it that construction. Besides, the day is involved in the issue; and the jury have found it. It may be said, as was said in *Gibbons* v. *Vouillon* (*e*), that this defence might have been pleaded *puis darrein continuance:* but the three months since the passing of the act have *now* elapsed, and the court will give the right judgment on the whole record, although the prayer of the plea may be informal: *Le Bret* v. *Papillon* (*f*); *Charnley* v. *Winstanley* (*g*); *Allen* v. *Hopkins* (*h*); *Cobbett* v. *Sir George Grey.* (*i*) [*Talfourd*, J. The plea is bad or good at the time of pleading.] The defendants might have pleaded *puis darrein continuance* at nisi prius.

Keating and *Winston*, in support of the rule. To give a retrospective construction to an act of parliament, the court will require very clear and unambiguous words indicating an intention on the part of the legislature that a vested right of action should be thereby affected. *Moon* v. *Durden* is a strong instance of the disinclination of the courts to construe statutes retrospectively. *Parke*, B., there says (*k*): "It seems a

(*a*) 1 *Stra.* 652.
(*b*) 1 *M. & Selw.* 111.
(*c*) 3 *Brod. & B.* 186, 6 *J. B. Moore*, 483.
(*d*) 11 *Q. B.* 23.
(*e*) *Antè*, Vol. VIII. p. 483.
(*f*) 4 *East*, 502.
(*g*) 5 *East*, 266.
(*h*) 13 *M. & W.* 94.
(*i*) 4 *Exch.* 729.
(*k*) 2 *Exch.* 22.

rial words in the clause are wholly inconsistent with any other construction.

No doubt, in construing mercantile contracts, "month" may mean lunar or calendar, according to the intention of the parties, as evidenced by custom or the surrounding circumstances. But, in a record, it means *primâ facie* a lunar month only. [*Williams*, J. Upon this record, it is capable of meaning "calendar month:" and, if so, it must be assumed that the judge told the jury so. *Cresswell*, J. What is the object proposed to be attained by the notice? *Aspland* suggested that it was to give the creditor an opportunity of inquiring into the genuineness of the deed. *Cresswell*, J. That's a strong reason for holding the provision in question to be prospective. The creditor would have had no interest in making the inquiry before the passing of this statute.]

WILDE, C. J. The court is placed in great difficulty in dealing with this act of parliament; and we are by no means enabled to arrive at a satisfactory conclusion as to some parts of it. We must, however, enter upon the consideration of it with a due regard to the well-known general principle, that statutes are not to be held to operate retrospectively, unless they contain express words to that effect. Sometimes, no doubt, the legislature finds it expedient to give a retrospective operation to an act to a considerable extent; but then care is always taken to express that intention in clear and unambiguous language. It is plain that this act was meant to be retrospective to a limited extent,—to establish certain deeds executed before the passing of the act. It is contended that the act was meant to operate retrospectively in another respect, which is quite contrary to the ordinary practice of the legislature,—*viz.*, to take away an action which has been

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well commenced in respect of a vested right. It must have been well known to both branches of the legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced: and we have carefully considered the act with a view to discover if it will bear such a construction as is contended for on the part of the defendants; but we are unable to arrive at any certain and satisfactory conclusion in the affirmative. Some expressions have been relied on as shewing that a retrospective operation was contemplated. But those expressions do not seem to us necessarily to bear the interpretation sought to be put upon them; for, we find the very same words used elsewhere in a sense which clearly could not be retrospective. The general rule of construction being as I have already stated, *viz.*, that the words of an act are to be construed to be prospective only, unless the intention of the legislature to the contrary is unequivocally expressed, and there being nothing to shew that the act was intended to be retrospective with reference to the matter now in question, we must construe it as being prospective only. This action, therefore, having been well brought, and there being nothing in the act to warrant us in saying that the legislature meant to take it away, the plaintiff is entitled to the judgment of the court.

CRESSWELL, J. I am entirely of the same opinion. At the time this action was commenced, the plaintiff had a clear right to bring it; and it is for the defendants to make out that the statute is retrospective, for the purpose of ousting the plaintiff of that right. If there is any ambiguity in the language of the act, the defendants' argument fails. I cannot say that the statute has any such effect, though it is possible that it may have been intended to be retrospective. Construing it,

The plea is clearly a bad plea. The 224th section of the 12th & 13th *Vict. c.* 106, enacts, "that every deed or memorandum of arrangement *now* or *hereafter* entered into between any such trader and his creditors, and signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same: and such deed or memorandum, when so signed, shall not be, or be liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy: provided always that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section then provides, "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of *three months* from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within *such time* obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for

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the statute now under consideration, I find no such clearly expressed intention, and therefore I feel bound to hold the act to be prospective only.

TALFOURD, J. I am of the same opinion. The general rule of construction is not denied; and it seems to me that its application to this case is sufficiently clear. "Such time," in the 225th section, means such time as a future deed or memorandum of arrangement has been duly signed by or on behalf of a majority of the creditors, and therefore must mean time future,—after the passing of the act. My Brother *Byles* suggests that the court may give judgment on the whole record, and that, after verdict, it will be assumed that the three months had elapsed after the passing of the act. That, however, would be an unwarrantable application of the rule of pleading. We must construe the pleadings as they are, not as they might have been. This plea being no good bar, the rule for entering judgment for the plaintiff *non obstante veredicto* must be made absolute.

Rule absolute.

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Held, that an instrument in the following form,—"*Port of London Sea, Fire, and Life Assurance Company.* To the cashier. Fifty-three days after date, *credit* Messrs. *P.* & Co., or order, with the sum of 500*l.*, claimed *per Cleopatra, in cash,* on account of this corporation.—*A. C.*, Managing Director,"—was properly declared on as a bill of exchange.

ASSUMPSIT. The first count was upon a policy of assurance made by the *Port of London Sea, Fire, and Life Assurance Company.* The second count charged the defendant as the drawer of a bill of exchange for 500*l.*, indorsed to the plaintiff. The third count described the same instrument as a promissory note. The fourth count was upon an account stated.

issue, which is joined upon the question whether or not the plaintiff had *notice* of the deed referred to in the second plea,—secondly, to enter a verdict for the plaintiff on the second issue *non obstante veredicto*, on the ground that the plea, if proved, is no answer to the action.

Upon the first point, it is material to see what deed it is that the creditors are bound by, and then to consider whether or not the plaintiff had notice of that deed. By the 224th section, it appears that it is not any particular description of deed that is to be binding upon the creditors, but that a deed of any kind, "signed by or on behalf of six sevenths in number and value of those creditors whose debts amount to 10*l*. and upwards, touching the trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto," shall, subject to the conditions thereinafter mentioned, be effectual and obligatory upon all the creditors. What are those conditions? Having already provided that a deed of the nature before mentioned, and signed as above, shall bind the creditors, the legislature proceed, in section 225, to enact, "that no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the court an order or certificate of the said court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of *such* majority of the creditors as aforesaid." Now, what was the notice here? The witness says, I held the deed in my hand,

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payees were debtors to the company at the maturity of the bill. If they *were* debtors, it would amount to an order to pay them the balance. [*Cresswell*, J. We cannot take into consideration any counter claim in construing this instrument.] This is, in truth, a mere order or direction from a principal to an agent. *In Russell* v. *Powell* (*a*), *J. M.*, by indenture assigned to the plaintiff a ninth part of his share in the residue of the estate of *T. H.* deceased. By an order of the 29th of *July*, 1842, made in a suit in Chancery, of *Powell* v. *Norwood*, the Vice-Chancellor ordered the defendants in that suit to retain 250*l.*, being part of the produce of *J. M.'s* share of the residuary estate of *T. H.*, to be paid to such person as the now defendant and *J. M.* should jointly direct. It was afterwards agreed between the parties, that 50*l.*, to be considered as part of the sum of 250*l.*, should be paid by the defendant to the solicitors for *J. M.* and the plaintiff. An action having been brought to recover this sum of 50*l.*, the plaintiff tendered in evidence the following document:—"To the executors of *T. H.*, deceased. *Powell* v. *Norwood*. Gentlemen,—We do hereby authorize and require you to pay to Mr. *George Powell*, or his order, the sum of 250*l.*, being the amount directed by the order of the 29th of *July* last to be paid to our order. We are, &c., *J. M. December* 16th, 1842." This document was signed by *J. M.* only, and was unstamped. It was held (*Rolfe*, B., *dissentiente*), that it was not a bill of exchange, and that it was admissible in evidence without a stamp. [*Cresswell*, J. Who ever heard of a negotiable right to be credited in a book? *Wilde*, C. J. Suppose this instrument had been *accepted* by the cashier, what would have been the consequence?] He would not have been liable to be called upon to pay it.

(*a*) 14 *M. & W.* 418.

This is not unlike the case of *Jenny* v. *Herle* (*a*), where it was held that a bill drawn payable out of a particular fund is not a bill of exchange. At the utmost, this is an order to pay out of the moneys of the corporation.

WILDE, C. J. I think this instrument is a bill of exchange. There is nothing ambiguous in its terms; nothing to be inferred but that the sum therein mentioned is to be paid. As I understand the words "credit in cash," this is an order by one person on another, to hold to the use, or at the command, of a third party, a certain sum. That means "pay the money to him." I see no ground for a rule.

CRESSWELL, J. "Credit in cash" clearly means "pay over the money." The case of *Russell* v. *Powell* differs essentially from this. There, a very special agreement was entered into: but the judgment of *Rolfe*, B., shews pretty strong reasons for construing the instrument to be a bill of exchange.

WILLIAMS, J. I am of the same opinion. "Credit in cash" is equivalent to "pay."

TALFOURD, J., concurred.

Rule refused.

(*a*) 1 *Stra.* 591.

ALLEN *v.* THE SEA FIRE AND LIFE ASSURANCE COMPANY.

April 18.

An instrument issued by a company, completely registered pursuant to the 7 & 8 *Vict. c.* 110, in this form,—"*Sea, Fire, Life Assurance Company.* To the cashier. Thirty days after date, *credit* Mrs. *A.*, or order, with the sum of 311*l.* 9*s.* 6*d.*, claims *per* '*Susan King*,' *in cash*, on account of this corporation,"—and signed by two of the directors of the company:—Held, to be a promissory note, and binding on the company, notwithstanding it might not have been drawn strictly pursuant to the provisions of the deed of settlement, so as to be binding upon the shareholders.

ASSUMPSIT. The first two counts were upon a policy of assurance,—the defendants being described in the first count to be a joint-stock company completely registered, by the name of *The Sea, Fire, Life Assurance Society*, and to have obtained a certificate of complete registration conformably to the statute 7 & 8 *Vict. c.* 110, intituled "An act for the registration, incorporation, and regulation of joint-stock companies."

The third count stated that the defendants theretofore, to wit, on the 28th of *October*, 1849, made their promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff, in the said note described as Mrs. *Ann Allen*, or order, the sum of 311*l.* 9*s.* 6*d.*, thirty days after the date thereof, and that the note was unpaid, &c.

The defendants traversed the making of the note mentioned in the third count.

At the trial, before *Wilde*, C. J., at the last assizes at *Maidstone*, the plaintiff put in an instrument in the following form, bearing an 8*s.* 6*d.* stamp:—

"*Marine Department.*

"*Sea, Fire, Life Assurance Society.*

"31, *Cornhill, October* 20th, 1849.

"689,617. £311 9*s.* 6*d.*

"To the cashier.

"Ninety days after date, *credit* Mrs. *Ann Allen*, or order, with the sum of three hundred and eleven pounds,

ıillings, and sixpence, claims *per 'Susan King,'* ı, on account of this corporation.

" *A. Davis,* } Directors."
" *W. Ogilvie,* }

ıtered, *F. F. A.*, Accountant."

:he part of the defendants, it was submitted that ıs not a promissory note at all, but a mere order payment of money; and that, if a promissory t was not drawn with the formalities required by tute 7 & 8 *Vict. c.* 110, *s.* 45. (*a*)

Vhich enacts,—" With to bills of exchange and ory notes made, accept- indorsed on the behalf unt of any such com- ɔ far as relates to the ' making, accepting, or ıg the same, and to the of any such company ,—that, if the directors company be authorized of settlement or bye- issue or accept bills of ge or promissory notes, ery such bill of exchange nissory note shall be r accepted (as the case) by and in the name of *he directors* of the com- whose behalf or account ıe may be so made or d, and shall be by such s expressed to be made ɔted by them on behalf ı company; and that ıch bill of exchange and ory note so made or d as aforesaid shall be *igned by the secretary appointed officer of the y* in whose behalf the expressed to be made or d; and that every bill ıange so made as afore- received, by or on behalf company, may be indorsed in the name of the company by any officer authorized by deed of settlement or bye-law in that behalf; and that every such bill of exchange or promissory note so made, accepted, or indorsed as aforesaid, shall, immediately after the making, accepting, or indorsing of the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted, or indorsed, and such last-mentioned officer shall enter the same in proper books to be kept for that purpose; and that, if any such bill of exchange or promissory note be not so reported and entered, then the officer by whose default such bill or note shall not be so reported or entered, shall be liable to repay to the company the amount which the company shall pay, or be liable to pay, in respect of such bill or note: Provided always that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon, except as shareholders

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Under the direction of his lordship, a verdic found for the defendants upon all the issues exce third, which was found for the plaintiff; and leav reserved to the defendants to move to enter the v for them on the third issue also, if the court s think either of the objections well founded.

Shee, Serjt., now moved accordingly. 1. The i ment produced at the trial was not a promissory it was not a note in terms necessarily for the pa of money. [*Wilde*, C. J. We held the other d *Ellison* v. *Collingridge* (*a*), that "credit in c without the aid of extrinsic circumstances, 1 "pay."] This is quite consistent with satisfacti set-off. [*Wilde*, C. J. So is a cheque.] But th does not appear upon the face of the instru [*Wilde*, C. J. There is no mutuality betwee person to whom the order is addressed and the h it is a direction by the employers to their clerk t the money.] This is more like a bill of exchange a promissory note. It is addressed to a person w not a member of the corporation,—to one who v have been personally liable upon it if he had acc it. [*Cresswell*, J. What more is necessary to m a promissory note? *Wilde*, C. J. Is not this l party drawing upon himself? It has been held th instrument purposely made ambiguous, may be dec on as a promissory note: *Allan* v. *Mawson* (*b*); v. *Bury* (*c*): and see *Brown* v. *De Winton* (*d*).]

of the company; and that every such company on whose behalf or account any bill of exchange or promissory note shall be made, accepted, or indorsed, in manner and form aforesaid, shall and may sue and be sued thereon as fully and effectually, and in the same manner, as in the case of any contract and entered into under common seal."

(*a*) *Antè*, p. 570.

(*b*) 4 *Campb.* 115.

(*c*) 6 *B. & C.* 433, 9 *D.* 492, 2 *Car. & P.* 559.

(*d*) *Antè*, Vol. VI. p. 3 *D. & L.* 62.

2. Assuming that this *was* a promissory note,—it is not drawn in conformity with the company's deed of settlement, under which alone it could be drawn. The 23rd clause provides that there shall be not less than three, or more than ten, directors of the company. The 44th authorises the directors to make, accept, and indorse bills and notes, in the whole not exceeding 100,000*l.*: if they exceed that sum, the shareholders are not liable. [*Cresswell*, J. Are the shareholders charged here?] They will be, when execution comes to be issued. [*Cresswell*, J. It might afford an answer to a motion for leave to issue execution against a shareholder. The instrument is binding upon the company, though it may not be upon a shareholder, except to the extent of the value of his shares.] Then, the deed contains no clause impowering *two* directors to draw or accept. [*Cresswell*, J. The 45th section of the 7 & 8 *Vict. c.* 110, gives authority to two directors to draw: the deed was made after the passing of that act, and this is one of the very things contemplated by it.] The note should have been countersigned by the secretary or other appointed officer of the company. [*Wilde*, C. J. This is countersigned by the accountant.] There was no evidence that he was the appointed officer of the company.

WILDE, C. J. I think there should be no rule in this case. The first objection is, that the instrument declared on in the third count is not a promissory note. What is necessary to constitute a promissory note? These parties issue this instrument, importing that the company promise to pay. The note is addressed by the drawers to their own clerk. My Brother *Shee* treats the cashier as a drawer. But at the trial it was insisted for the plaintiff, that the instrument was precisely what we think it is. The company indicate that they mean to pay, by a direction to their officer to pay,—"credit

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in cash," meaning, as we held in the former case, "pay;" and they point out to whom payment is to be made. It appears to me that the instrument contains all that is essential to constitute a promissory note. It is then said, that assuming it to be a promissory note, it is not made in conformity with the deed of settlement. This note, however, is issued by the company; and the action is brought against them. The restrictions in the deed cannot be prayed in aid in an action wherein the shareholders do not appear to be charged. What may be its operation as to them remains to be seen. Next it is said that the note does not purport to be signed by all the directors: but that objection is answered by the authority given by the deed, and by the 45th section of the statute, which provides, that, "if the directors of the company be authorised by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted (as the case may be) by and in the name of *two of the directors* of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company." There is no stipulation in the deed which is inconsistent with that. This note, therefore, is properly signed by two directors. It is next objected that the note is not countersigned by the secretary or other officer appointed by the company. How are parties to know who is an officer appointed by the company? By "countersigned," I understand that the instrument must appear to have passed under the signature of some appointed officer. Here, the accountant has authenticated this instrument by his signature. I think there is no foundation for either of the objections.

The rest of the court concurring,

Rule refused.

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BEAVAN *v.* COX and Another.

May 6.

Upon error *coram vobis* to reverse an outlawry, a verdict having been found for the plaintiff in error upon a traverse of the assignment of errors, and the time for moving for a new trial having passed,—the plaintiff is entitled to a rule absolute to reverse the outlawry, upon production of the record and *postea*.

JUDGMENT in outlawry having been recovered against the plaintiff at the suit of the defendants, the former brought a writ of error *coram vobis* to reverse the outlawry, assigning for error, that he, the plaintiff, was, "before and at the time of awarding and issuing of the writ of *exigi facias* upon which the said judgment of outlawry was pronounced, and thence continually afterwards until the time of pronouncing the said judgment of outlawry, and afterwards, was in parts beyond the seas."

Prideaux,—upon an affidavit stating the above facts, and also stating that the defendants by their plea traversed the said assignment of error, that the cause was tried on the 29th of *April* last, when a verdict was found for the plaintiff in error, and that the *habeas corpora* in the cause was returnable on the 27th of *April* last, and that no rule for a new trial had been granted, and upon production of the record and *postea*,—moved to reverse the outlawry. He stated that this course had been adopted in a case of *Greville* v. *Stulz* (*a*).

WILDE, C. J., after conferring with the masters, said that the rule might be absolute in the first instance.

Rule accordingly.

(*a*) In *Q. B.*, Michaelmas Term, 1847.

April 26. HALLETT and Others *v.* WIGRAM and Others.

A claim for contribution to general average arises only where a part of the cargo is sacrificed for the preservation of the ship and the rest of the cargo from an impending danger: not where a part of the cargo is sold to raise money at a port to which the ship has put back for the repair of damage incurred by ordinary perils of the sea.

THIS was an action of assumpsit. The first count of the declaration stated that the defendants, before and at the several times hereinafter mentioned, to wit, on the 15th of *March*, 1847, were owners of and interested in, and in possession of, a certain ship or vessel called the *Harpooner*, then being at a certain port, to wit, at *Adelaide*, in *South Australia*, and bound from thence to a certain port in the United Kingdom, to wit, to *Swansea*, in *South Wales*: that theretofore the plaintiffs, to wit, on the day and year aforesaid, at the special instance and request of the defendants, caused to be shipped and loaded in and on board of the said ship, at *Adelaide* aforesaid, divers goods and merchandises of them the plaintiffs, to wit, five hundred tons of copper ore, of great value, to wit, of the value of 20,000*l.*, to be carried and conveyed in the said ship by the defendants for the plaintiffs, from *Adelaide* aforesaid to *Swansea* aforesaid, and there, to wit, at *Swansea* aforesaid, to be delivered by the defendants to the plaintiffs, the dangers and accidents of the seas and navigation only excepted, for certain freight and reward to be paid by the plaintiffs to the defendants in that behalf: That thereupon, afterwards, to wit, on the day and year aforesaid, the said ship set sail and proceeded on her said voyage from *Adelaide* aforesaid to *Swansea* aforesaid, with the said goods and merchandises of the plaintiffs, and certain other cargo, on board thereof, and afterwards, and while she was so proceeding on her said voyage, with the said goods and merchandises and cargo on board thereof as aforesaid,

to wit, on the day and year aforesaid, the said ship was, by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, in the course of such voyage, greatly damaged and injured; and thereupon, and in consequence of the said injury and damage so sustained as aforesaid, the master of the said ship did, to wit, on the day and year aforesaid, cause the said ship to, and the said ship did then, put back and sail back again to *Adelaide* aforesaid, to have the said injury and damage repaired; and the said injury and damage was, by the direction of the said master, to wit, on the day and year aforesaid, then and there repaired: That the costs and expenses thereby then and there incurred by the defendants as owners of the said ship as aforesaid, in and about the repairing the said damage and injury, and in and about the providing the necessary stores and victuals for the supply of the said ship, and the crew thereof, amounted in the whole to a large sum, to wit, to the sum of 10,000*l.*; and, because the master of the said ship had not then, and could not obtain, moneys for the repairs of the said ship, and without such moneys the said ship could not then have been repaired, and the same, and the freight to be earned by the carriage of the said goods, would then have become wholly useless and lost to the defendants, the said master did then, for the preservation of their said ship as aforesaid, and in order to enable them to earn the said freight of the said ship for the said voyage as aforesaid, and to pay the costs and expenses so incurred as aforesaid, take a large portion, to wit, three hundred tons of the said copper ore of the plaintiffs, of great value, to wit, of the value of 10,000*l.*, so delivered to them the defendants to be carried and conveyed and delivered to the plaintiffs as aforesaid, and did then sell the same for a certain sum of money, to wit, the sum of 5,000*l.*, with which last-mentioned

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sum of money so realised by the sale of the said copper ore as aforesaid, the costs and charges so as aforesaid incurred in and about the premises were paid, to wit, by the defendants; and the said ship afterwards, to wit, on the day and year aforesaid, so repaired, resumed her voyage, and afterwards, to wit, on the day and year aforesaid, arrived in safety at her destined port: That the defendants did then, in consideration of the premises, promise the plaintiffs that they would, on the request of the plaintiffs, pay to them, the plaintiffs, the value of the said copper ore so sold as aforesaid, and contracted to be carried, conveyed, and delivered as aforesaid, for which the same might have been sold, had the same then been delivered by the said defendants to the said plaintiffs at *Swansea* aforesaid: That the value of the said copper ore so sold as aforesaid, for which the same might have been sold at *Swansea* aforesaid, had the same then been delivered there to the plaintiffs as aforesaid, amounted to a large sum of money, to wit, the sum of 10,000*l.*,—of all which premises the defendants then had due notice, and were afterwards, to wit, on the 1st of *June*, 1848, requested by the plaintiffs to pay to them the said last-mentioned moneys, &c.

Second plea.

To this count the defendants pleaded, secondly,—except as to the non-payment by the defendants of the sums of 1,680*l.* 17*s.* 8*d.* and 770*l.* 4*s.* 11*d.*, parcels respectively of the said sum of 10,000*l.* for which the said copper ore so sold as in that count mentioned, might have been sold, had the same been delivered by the defendants to the plaintiffs at *Swansea* aforesaid, as in the said first count mentioned,—that, on the occasion of the said ship so being by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, damaged and injured as in the said first count mentioned, the said ship became and was, in

consequence of the said injury and damage, the same then being dangers and accidents of the seas and navigation, broken, leaky, dangerous, and incapable of further prosecuting her said voyage, insomuch that it then became expedient and necessary, for the preservation of the said ship and her cargo, and to enable her to complete her said voyage, and to prevent the said ship, with her said cargo, from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs and all persons interested in the said cargo, and in the performance or completion of the said voyage, that the said ship should put back and sail back, as in the said first count mentioned, to have the said cargo unloaded and taken from on board the said ship, and the said damage and injury repaired; and the said ship did so sail back and put back, and the master of the said ship did so cause the said ship to sail back and put back as in the first count mentioned, to have the said cargo unloaded, and the said damage and injury repaired, and for the preservation of the said ship and cargo, and to enable the said ship to complete her said voyage, and to prevent the said ship and cargo being wholly lost, and for such common benefit and advantage as aforesaid,—the said port and place to which the said ship so sailed back and put back as aforesaid then being the most proper and convenient port and place in that behalf for the preservation of the said ship and cargo, and at which the said ship could be repaired or made fit to prosecute her said voyage: That the said cargo then was unloaded, and the said ship repaired, for such common benefit and advantage as aforesaid, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the said ship more or in a greater degree than of the owners of the said cargo: That the said repairs in the said first count mentioned were necessary and requisite for the

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completion of the said voyage, and the said costs and expenses in the first count mentioned were then incurred for the said repairs, and in and about the unloading of the said cargo as aforesaid: That the costs of the said repairs then greatly exceeded the value of the said ship when the same was so repaired, and the said repairs were such as ought not to have been done to the said ship, except for the purposes of conveying the said cargo to the said port of delivery, and the same would not have been done to the said ship, if the said cargo could otherwise have been conveyed to the said port of delivery; and, because the said master was unable, by bottomry, hypothecation, or otherwise than by such sale as hereinafter mentioned of part of the said cargo, to raise funds sufficient for the said costs and expenses, or to cause or procure the said repairs to be done on credit, or to convey or cause to be conveyed the remainder of the said cargo to the said port of delivery, to wit, to *Swansea* aforesaid, he, the said master, in order to complete the said voyage, and to convey the remainder of the said cargo to the said port of delivery, and as a matter of urgent necessity, as the same then was, did, at the time in the said first count in that behalf mentioned, sell the said part of the said copper ore in the said first count in that behalf mentioned, together with certain other goods, being part of the said cargo,—he, the said master, then exercising reasonable and proper discretion and due care and diligence, and, after due deliberation had by him in that behalf, reasonably and *bonâ fide* deeming and considering it to be, as the same in fact then was, the best thing that could be done for all parties concerned in the said voyage, and especially for the owners of the remainder of the said cargo then remaining unsold: That the proceeds of the sale of the said part of the said copper ore so sold as aforesaid, amounted to a certain sum, to

wit, the sum of 1,680*l.* 17*s.* 8*d.*, and no more, although he, the said master, then sold the same for the best price that could be obtained for the same at the said port and place where the same was so sold as aforesaid, and then used due care and diligence and his utmost endeavours to obtain for the said part of the said copper ore so sold as aforesaid the best and highest possible price; and the said part of the said copper ore, and the said part of the said cargo so sold as aforesaid, then being a proper and convenient part to be so sold on such emergency, and being such part as could be sold with as little loss as possible: That the master of the said ship did then, with and by means of the proceeds of the said sale, cause the necessary repairs to be done, and prosecute and complete the said voyage with the said ship, and the remainder of the said cargo, and of the said copper ore so delivered to the defendants, for the purpose in the first count mentioned, and did afterwards, to wit, on the 1st of *January*, 1848, deliver the same to the plaintiffs at the port of delivery, to wit, at *Swansea* aforesaid, the same then being of great value, to wit, of the value of 5,000*l.*, and having been safely and securely carried and conveyed on board the said ship from *Adelaide* aforesaid to *Swansea* aforesaid: That the value to the plaintiffs of the said part of the said copper ore so sold as aforesaid, if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid, would then have been a certain sum, to wit, the sum of 5,707*l.* 3*s.* 4*d.*, and no more; and that, on the occasion aforesaid, by reason of the sale aforesaid, a certain loss (exceeding the value of the said ship when so repaired as aforesaid) was incurred, to wit, to the amount of 4,026*l.* 5*s.* 8*d.*, the same being the difference between the produce of the said sale and the value to the plaintiffs of the said part of the said copper ore so sold as aforesaid, and which

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the said part would have been worth if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid; and the said sum of 4,026*l.* 5*s.* 8*d.* was, on the occasion of the said sale, lost and sacrificed in the manner aforesaid, and for the common benefit and advantage of all parties interested in the said ship or freight, or her said cargo, or the completion of the said voyage; and the said loss was incurred for such common benefit and advantage as aforesaid; and, by the usage and custom of merchants, the said loss and sacrifice so incurred and made as aforesaid was and is the subject of a general average contribution by and amongst all parties interested in the said ship and the said cargo, and the completion of the said voyage, and in the freight to be therein earned by the said ship, in proportion to their respective interests: That the amount of such contribution to be by them, the defendants, contributed in proportion to their interest in the said ship, freight, and cargo, amounted to a certain sum, to wit, the sum of 770*l.* 4*s.* 11*d.*, and no more: That the defendants, by reason of the premises, became and were discharged from the payment of any larger sum in respect of the said copper ore so sold as aforesaid, and the value thereof for which the same might have been sold had the same been delivered by the defendants to the plaintiffs at *Swansea* aforesaid, other than and beyond the amount of the proceeds of the sale of the said copper ore so sold as aforesaid, to wit, the said sum of 1,680*l.* 17*s.* 8*d.*, and the amount of the said last-mentioned contribution, to wit, the sum of 770*l.* 4*s.* 11*d.*, which said two sums of 1,680*l.* 17*s* 8*d.* and 770*l.* 4*s.* 11*d.* are the sums in the introductory part of this plea mentioned, and therein excepted.

Third plea.

Third plea, to the first count,—so far as the same relates to the non-payment by the defendants of the sum of 3,342*l.* 17*s.*, parcel of the value of the said

copper ore so sold as in that count mentioned, for which the same might have been sold had the same been delivered by the defendants to the plaintiffs at *Swansea* aforesaid, as in the said first count mentioned,—that, on the occasion of the said ship so being, by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, damaged and injured, as in the said first count mentioned, the said ship became and was, in consequence of the said injury and damage, the same then being dangers and accidents of the seas and navigation, broken, leaky, dangerous, and incapable of further prosecuting her said voyage, insomuch that it then became expedient and necessary, for the preservation of the said ship and her cargo, and to enable her to complete her said voyage, and to prevent the said ship, with her said cargo, from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs and all persons interested in the said cargo, or in the performance or completion of the said voyage, that the said ship should put back and sail back, as in the said first count mentioned, to have the said cargo unloaded and taken from on board the said ship, and the said damage and injury repaired; and the said ship did so sail back and put back, and the said master of the said ship did so cause the said ship to sail back and put back, as in the first count mentioned, to have the said cargo unloaded, and the said damage and injury repaired, and for the preservation of the said ship and cargo, and to enable the said ship to complete her said voyage, and to prevent the said ship and cargo being wholly lost, and for such common benefit and advantage as aforesaid,—the said port and place to which the said ship so sailed back and put back as aforesaid, then being the most proper and convenient port and place in that behalf for the preservation of the said ship and cargo, and at which the said

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ship could be repaired or made fit to prosecute her said voyage; and the said cargo then was unloaded, and the said ship repaired, for such common benefit as aforesaid, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the said ship more or in a greater degree than of the owners of the said cargo: That the said repairs in the said first count mentioned were requisite and necessary for the completion of the said voyage: That the said costs and expenses in the said first count mentioned were then incurred for the said repairs, and in and about the unloading of the said cargo as aforesaid, and the costs of the said repairs then greatly exceeded the value of the said ship when the same was so repaired, and the said repairs were such as ought not to have been done to the said ship, except for the purpose of conveying the said cargo to the said port of delivery, and the same would not have been done to the said ship if the said cargo could otherwise have been conveyed to the said port of delivery: That, because the said master was unable, by bottomry, hypothecation, or otherwise than by such sale as hereinafter mentioned of part of the said cargo, to raise funds sufficient for the said costs and expenses, or to cause and procure the said repairs to be done on credit, or to convey or cause to be conveyed the remainder of the said cargo to her said port of delivery, to wit, to *Swansea* aforesaid, he, the said master, in order to complete the said voyage, and to convey the remainder of the said cargo to the said port of delivery, and as a matter of urgent necessity, as the same then was, did, at the time in the said first count in that behalf mentioned, sell the said part of the said copper ore in the said first count in that behalf mentioned, together with certain other goods, being part of the said cargo, and shipped and delivered on board the said ship, to be by the defendants, as owners

of the said ship, conveyed on board the same from *Adelaide* aforesaid to *Swansea* aforesaid, he, the said master, then exercising reasonable and proper discretion and due care and diligence, and, after due deliberation had by him in that behalf, reasonably and *bonâ fide* deeming and considering it to be, as the same in fact then was, the best thing that could be done for all parties concerned in the said voyage, and especially for the owners of the remainder of the said cargo then remaining unsold: That the proceeds of the sale of the said part of the said cargo, to wit, the said copper ore and other goods so sold as aforesaid, amounted to a certain sum, to wit, the sum of 2,410*l.* 2*s.* 3*d.*, and no more, although he, the said master, then sold the same for the best price that could be obtained for the same at the said port as aforesaid, and then used due care and diligence, and his utmost endeavours to obtain for the said part of the said cargo so sold as aforesaid the best and highest possible price, and the said part of the said cargo so sold as aforesaid then being a proper and convenient part to be so sold on such an emergency, and being such part as could be sold with as little loss as possible: That the said master of the said ship did then, with and by means of the proceeds of the said sale, cause the necessary repairs to be done, and prosecute and complete the said voyage with the said ship, and remainder of the said cargo, and of the said copper ore so delivered to the defendants, for the purpose in the said first count mentioned, and did afterwards, to wit, on the 1st of *January*, 1848, deliver the same to the plaintiffs at the port of delivery, to wit, *Swansea* aforesaid, the same then being of great value, to wit, the value of 5,000*l.*, and having been safely and securely carried and conveyed on board the said ship from *Adelaide* aforesaid to *Swansea* aforesaid: That the value to the owners of the said part of the said cargo so

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sold as aforesaid, was, and, if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid, would then have been, a certain sum, to wit, the sum of 6,544*l.* 3*s.* 1*d.*; and that, on the occasion aforesaid, by reason of the sale aforesaid, a certain loss, exceeding the value of the said ship when so repaired as aforesaid, was incurred, to wit, to the amount of 4,258*l.* 14*s.* 11*d.*, the same being the difference between the proceeds of the said sale and the value of the said part of the said cargo so sold as aforesaid, and which the said part would have been worth if the same had been conveyed to the said port of delivery, instead of being so sold as aforesaid; and the said sum of 4,258*l.* 14*s.* 11*d.* was, on the occasion of the said sale, lost and sacrificed in the manner aforesaid, and for the common benefit and advantge of all parties interested in the said ship or freight, or her said cargo, or the completion of the said voyage; and the said loss was incurred for such common benefit and advantage as aforesaid; and, by the usage and custom of merchants, the said loss and sacrifice so incurred and made as aforesaid was and is the subject of a general average contribution by and amongst all persons interested in the said ship and the said cargo, and the completion of the said voyage, and in the freight to be therein earned by the said ship, in proportion to their respective interests: That, by the usage and custom of merchants, the said defendants, as owners of the said ship, were and are liable to reimburse and make good to the owners of the said goods so sold as aforesaid, the amount in respect of the said loss to which such last-mentioned owners were and are entitled by reason of such sale: That the said defendants, as such ship-owners, so being liable to reimburse and make good the said loss, were and are, by the said usage and custom of merchants, entitled to receive the contributions to such general average: That

the amount of such contribution to be by the plaintiffs contributed, in proportion to their interest in the said copper ore and cargo, amounted to a certain large sum, to wit, the said sum of 3,342*l.* 17*s.*, whereof the defendants, before the commencement of this suit, to wit, on the 1st of *January*, 1849, had notice, and the same always had been and still remained unpaid and unsatisfied by the plaintiffs; and thereupon, by reason of the premises in that plea mentioned, and by the usage and custom of merchants, the defendants became and were before the commencement of this suit, and thence hitherto had been, and still were, entitled to deduct the last-mentioned sum of money from the said sum in the said first count alleged to be payable from the defendants to the plaintiffs, as the value of the said copper ore so sold as aforesaid, and to set off and allow the said sum of 3,342*l.* 17*s.* against an equal amount of the value of the said copper ore of the plaintiffs so sold as aforesaid, and to have such equal amount liquidated and discharged: That the amount of contribution to be contributed by the plaintiffs as aforesaid, was ascertained before the commencement of this suit, to wit, on the day and year last aforesaid, and the defendants then were, and thence hitherto had been ready and willing to have the amount of the said contribution deducted from the value of the said copper ore, and that an equal amount of the value of the said copper ore should be set off and allowed against the said amount of contribution, and should be thereby liquidated and discharged,—of all which the plaintiffs then, to wit, on the day and year last aforesaid, had notice, and were then, and before the commencement of this suit, required by the defendants to make and allow such allowance, deduction, and set-off as aforesaid; and the defendants thereby, according to the usage and custom of merchants, became and were discharged from the

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payment of the said sum of 3,342*l.* 17*s.* in the introductory part of this plea mentioned, the same being equal to and equalled by the amounts of such contribution so to be by the plaintiffs contributed as aforesaid,—verification.

To these pleas, the plaintiffs demurred specially.

Sir F. Kelly (with whom was *Barstow*), in support of the demurrer. The facts which appear upon the record are these:—The *Harpooner* received on board at *Adelaide* a quantity of copper ore belonging to the plaintiffs, with which she sailed on her voyage to *Swansea*. In the course of the voyage, the ship sustained sea damage which compelled her to return to *Adelaide*. Considerable repairs being found necessary to enable the vessel to pursue her voyage, and the master being unable otherwise to raise money to effect such repairs, and being unable otherwise to forward the rest of the cargo to the port of destination, a portion of such cargo, belonging to the plaintiffs, was sold, and the vessel, being repaired, afterwards completed her voyage, and delivered the rest of the cargo at *Swansea*. The second plea, admitting the facts stated in the declaration, and admitting the liability of the defendants to pay the value of the goods so sold at the port of discharge, alleges that the vessel put back for the common benefit of the plaintiffs and all persons interested in the ship, freight, and cargo, and in the performance of the voyage; that the ship was repaired for such common benefit and advantage, and not for the exclusive benefit of the defendants, or for the benefit or advantage of the defendants as owners of the ship, more, or in a greater degree, than of the owners of the cargo; that the repairs were necessary; that the costs of the repairs greatly exceeded the value of the ship when repaired (not the value of the ship *and freight*);

that the master, being unable, by bottomry, hypothecation, or otherwise, to raise money to pay for the repairs, or to get them done on credit, as a matter of urgent necessity, sold a portion of the cargo, reasonably and *bonâ fide* considering it to be, as in fact it was, the best that could be done for all parties concerned in the voyage, and especially for the owners of the remainder of the cargo; that the master, with the money thus obtained, repaired the ship, completed the voyage, and delivered the residue of the cargo at its destined port; that the difference between the sum realized by such sale and the price the ore so sold would have fetched at *Swansea*, was a loss incurred for the common benefit, and was by the usage and custom of merchants the subject of general average contribution by and amongst the parties interested in the ship and cargo, and the completion of the voyage, and in the freight to be therein earned by the ship, in proportion to their respective interests. The allegation is, that the costs of repairing the ship at *Adelaide* exceeded the value of the ship when repaired,—not the value of the *ship and freight*. This is in truth an attempt to convert a sale of part of the cargo into a jettison. The plaintiffs are clearly entitled to the value which the copper would have realized if it had been delivered according to the bills of lading: *Alers* v. *Tobin* (*a*); *Brandt* v. *Bowlby*. (*b*) This is a claim for general average. The circumstances disclosed upon the record clearly afford no foundation for such a claim. [*Wilde*, C. J. Would bottomry interest be general average?] Certainly not. If there could be a doubt upon the subject, it is removed by the recent case of *Duncan* v. *Benson*. (*c*) The question is glanced at in *Powell* v. *Gudgeon* (*d*); but it was ex-

(*a*) Cited in *Abbott* on Shipping, 8th ed. 371, 372.
(*b*) 2 *B. & Ad.* 792.
(*c*) 1 *Exch.* 537.
(*d*) 5 *M. & Selw.* 431.

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pressly decided in *Power* v. *Whitmore*. (*a*) In this latter case, the wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was detained there, on account of adverse winds and tempests; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an impending peril of being driven on shore and stranded. Lord *Ellenborough* there said "that general average must lay its foundation in a sacrifice of part for the sake of the rest; but here was no sacrifice of any part by the master, but only of his time and patience; and the damage incurred was by the violence of the wind and weather." And his lordship explained and modified a doctrine which had been imputed to him in the report of a former case of *Plummer* v. *Wildman*. (*b*) Is the case at all varied by the fact that the repairs exceeded the value of the ship, and that the benefit was mutual? If a ship puts back damaged, the master must determine whether he will repair her or not. It may be that it is not his duty to repair, where the cost of repair will exceed the value of the ship and freight when the repairs are executed: but, if he does in fact repair her, he does so as the agent, and upon the sole responsibility, of the owners. That is settled beyond all doubt. The only case on which any doubt could arise, is that of *The Gratitudine*. (*c*) But, when the particular circumstances of that case are looked at, it will be found not to be

(*a*) 4 *M. & Selw.* 141.
(*b*) 3 *M. & Selw.* 482.
(*c*) 3 *Rob. Adm. Rep.* 257.

inconsistent with the other authorities. It is thus that that case is explained by the court of Exchequer in *Duncan* v. *Benson*, confirmed by the Exchequer Chamber in *Benson* v. *Duncan*. (*a*) In that case, the court of Exchequer say: (*b*) "It is the primary duty of the master, acting for the owner, to do his best to convey the cargo to its place of destination in the same ship, and, in case of damage, to repair it. 'He ought to look out for the means of accomplishing his own and his employer's contract; that is, the safe conveyance of the property intrusted to his care, and in the same vehicle which he had contracted to furnish:' *The Gratitudine*. The owner of the goods is under no obligation to contribute to any expenses, except such as constitute a general average, and that of the repairs in this particular case does not fall under that description." Every circumstance that exists in this case existed there; and there was this further circumstance in that case, which does not occur here, viz. that the expense of repairs exceeded the value of the ship and cargo, when repaired: and still the court held that it was not a case of general average. The judgment proceeds: "To accomplish the object of repairing the vessel, the master is authorised to bind his owner, by causing the repairs to be done on his credit, in which case the tradesman may sue the owner; or by borrowing money on his credit where that is necessary, in which case the lender has his remedy against the owner; or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale: *Richardson* v. *Nourse* (*c*), and in this case the shipper may sue the ship-owner; or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to

(*a*) 3 *Exch.* 644.
(*b*) 1 *Exch.* 555.
(*c*) 3 *B. & Ald.* 237.

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recover a compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the ship-owner on his account, and for his use, to enable him to do his duty by repairing the vessel; and in all the ship-owner must repay the lender. The agency to borrow by these various modes, and so to bind his employer to the lender, is cast upon the master by the necessity of the case." [*Wilde*, C. J. If the goods had been hypothecated here, instead of sold, that case would have been precisely this.] It would. It is unnecessary to notice the special grounds of demurrer. The pleas are clearly bad in substance.

Channell, Serjt. (with whom was *Rew*), *contrà*. The decision in *Duncan* v. *Benson* does not affect this case to the extent that has been supposed. Since the case of *The Gratitudine*, it had been imagined, that, where a *bonâ fide* necessity existed, the master, in selling the goods, acted as the agent of the owner of the goods, and not as the agent of the ship-owner. What *Duncan* v. *Benson* decided was in truth this,—that, where the master, under a justifiable necessity, sells goods, or pledges or hypothecates them, he does so as the agent of the owner of the ship, and not as agent of the owner of the goods, except so far as is necessary to give title to the vendee or pawnee. No point was made there as to whether the case was one of general average. It must be conceded that the shipper is entitled to claim the value of the goods at the port of delivery: that seems to be settled by *Richardson* v. *Nourse*. (*a*) But the sale having taken place under circumstances of urgent necessity, and for the benefit of all parties concerned, it is properly a subject of general average. The principle on which general average rests is thus laid down in *Abbott* on Ship-

(*a*) 3 *B. & Ald.* 237.

ping (*a*): "We have seen, in a former part of this work, that a master may, under certain circumstances, borrow money on the security of his ship, or of its cargo; and that, if his vessel be disabled by the perils of the sea, from carrying her cargo to its destination, he may, if he think proper, hire another vessel for that purpose. But, supposing him to be unable to raise money on bottomry, or by hypothecation of the cargo, and that no other vessel can be obtained, he is at liberty to sell part of the goods intrusted to him, to enable him, by repairing his ship, to carry the remainder to their destination. Goods thus sacrificed for the benefit of the owners of the rest of the cargo, seem to have been considered by Lord *Stowell*, in the case of *The Gratitudine*, and have been considered in other cases, to be the proper subject of a general average. (*b*) The motive of the sale, in the case supposed, is no other than the motive for jettison. It is the same thing to the merchant whose goods are taken from his control, whether they are sold or thrown into the sea. In either case, it is a sacrifice submitted to by him for the benefit of all, and which ought therefore to be made good by general contribution." The law is similarly laid down in 2 *Arnould* on Insurance, p. 891, where it is said, that "when such a sale is clearly made out to have been for the *general benefit*, it entitles the owner of the goods so sold to claim a general average contribution in respect of the loss he has sustained by the transaction, just as though the goods had been jettisoned." (*c*) The like is stated in *Benecke's* Principles of Indemnity, p. 271. That the master is justified in selling a portion of the cargo for the repairs of the ship in a foreign port, in case of urgent necessity, is

(*a*) 8th edit. p. 498.

(*b*) Citing *Hobson* v. *Wilson*, 3 Campb. 480, *Richardson* v. *Nourse*, 3 *B. & Ald.* 237.

(*c*) *Kent's Comm.* Vol. iii. p. 342 (*b*), edit. 1844.

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conceded in *Campbell* v. *Thompson.* (*a*) In *Plummer* v. *Wildman* (*b*), where a ship, in the course of her voyage, was run foul of by another ship, and damaged, and the captain was in consequence obliged to cut away part of the rigging, and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage, or safely kept the sea,—it was held, that the expenses of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no further, and of unloading the goods for the purpose of making the repairs, were a general average. And Lord *Ellenborough* said: "If the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment." That doctrine is certainly somewhat modified by the subsequent case of *Power* v. *Whitmore.* (*c*) A sale under circumstances like those in this case was held, in the case of *La Constancia* (*d*), to constitute general average. In the case of *The Packet* (*e*), it was held, that, if the property of a shipper be taken and sold for the ship's necessities, and to enable her to perform the voyage, the party has a right of contribution over against the other shippers, and his remedy is not confined to the ship-owner. Mr. Justice *Story*, in an

(*a*) 1 *Stark. N. P. C.* 490.
(*b*) 3 *M. & Selw.* 482.
(*c*) 4 *M. & Selw.* 141.
(*d*) 2 *W. Rob. Adm. Rep.* 487.
(*e*) 3 *Mason's Rep.* (*American*), 255.

elaborate judgment delivered in that case, says: "In the case of a sale of part of the cargo by the master for the necessities of the ship, the sale is in the nature of a compulsive loan for the benefit of all concerned, and to enable the ship to prosecute her voyage. It bears a considerable resemblance to the case of a jettison; for, the owner is deprived of his property for the common good; and to him it must be immaterial whether the loss be by a sacrifice at sea or on shore. In the case of *The Gratitudine* (a), Lord *Stowell* manifestly treated it as a case of contribution. His language is, 'All must finally contribute in the case of an actual sale of a part;' and then, adverting to the case of bottomry of the whole, which he considered as equivalent to a sale of a part, he added, 'All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance.' This opinion is again intimated in *The Hoffnung* (b), although the facts of that case did not require its application. The same doctrine is supported by *Emerigon* (c), who expressly holds that the owner of the goods sold has a right of contribution against the owners of the goods saved, whatever may, in the event of a successful voyage, be the ultimate right of recovery over against the owner of the ship. There is also no inconsiderable weight of authority in its favour from other maritime sources." (d) That the sale here was not for the exclusive benefit of the ship-owners, is clear from the

(a) 3 *Rob. Adm. Cas.* 260.
(b) 6 *Rob. Adm. Cas.* 383.
(c) *Emerigon* on Maritime Laws, ch. iv. § 9, ch. xii. § 4.
(d) *Stevens* on Average, pp. 19, 24, 28, 29; *Weskett*, General Averages, pp. 252, 256, 259, art. 16; *Consolato del Mare*, ch. 104, 105; *Abbott* on Shipping, Part. III. ch viii. §§ 5, 8.

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statement that there were no other means of carrying the residue of the cargo to its destination.

Sir F. Kelly was heard in reply.

WILDE, C. J. The question presented for our decision in this case is undoubtedly one of considerable importance in its consequences, though it may be doubted whether it be one of much difficulty. The plaintiffs, who had shipped certain copper ore on board the defendants' vessel at *Adelaide*, to be conveyed to *Swansea*, bring this action to recover damages for the sale of a portion of the ore at *Adelaide*, claiming what it would have fetched at the port of delivery—*Swansea*. The defendants, in their pleas, set out in detail the circumstances under which the sale took place, and, admitting the plaintiffs' right to the proceeds at the port of sale, insist that the rest is in the nature of general average. The pleas, in substance, state, that, after the vessel, with the cargo in question, and other goods on board belonging to other persons, had sailed from *Adelaide*, she encountered a storm and sustained damage, and it became necessary for the preservation of the ship and cargo, and to enable her to complete the voyage, that she should put back for repair; that she accordingly did put back, and was repaired for the common benefit and advantage of the owners of the ship and cargo; that the costs of the repairs exceeded the value of the ship when repaired, and ought not and would not have been incurred if the cargo could otherwise have been conveyed to the port of delivery; that the master, being unable otherwise to raise money to pay for the repairs, necessarily sold a portion of the copper, in order to enable him to do the repairs, and convey the remainder to *Swansea;* that the ship sailed, and the residue of the ore was duly delivered at

Swansea; that the loss on the sale,—the difference between the proceeds of the sale at *Adelaide* and the value of the ore to plaintiffs if it had been conveyed to the port of delivery,—exceeded the value of the ship when repaired, and was incurred for the common benefit and advantage of the owners of ship and cargo; and that the loss so incurred was by the usage and custom of merchants the subject of a general average contribution between and amongst all parties interested in the ship, freight, and cargo, and in the completion of the voyage; and that the defendants were not liable to contribute to the loss beyond the amount of the proceeds of the sale, and the amount of general average payable by them in respect of their interest in the ship and freight. It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination, that the pleas shew that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit and advantage of the plaintiffs. The plaintiffs' goods were of a description not to be deteriorated to any great extent. The pleas allege that the *cargo* could not be conveyed to its port of delivery by any other ship: but it appears both from the declaration and the pleas, that the cargo consisted of other goods besides those of the plaintiffs; and there is no allegation that the plaintiffs' goods might not have been forwarded by another ship, or that they were in any immediate peril. This, therefore, is the case of ordinary sea damage, which the ship-owner must repair at his own expense. The claim for general average arises where a part of a shipper's goods is sold or destroyed for the purpose of relieving the rest from some impending peril. For instance, in the case of goods thrown overboard to lighten a ship in distress. So, the cutting away a mast, or otherwise damaging the ship, in order to

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enable her to escape the danger. In those cases, the loss or damage being incurred for the purpose of insuring the safety of the rest of the cargo, or preventing the ship from going to the bottom, it is but reasonable that the expense should be sustained by those for whose benefit it is incurred, in proportion to their several interests. But how is that analogous to this case? The passage cited from *Abbott* on Shipping, 8th edit. p. 478, is, I think, adverse to the claim of the plaintiffs. "Not only," says Lord *Tenterden*, "may the loss of goods become the subject of general contribution, but also, in some cases, the expense incurred in relation to them. Thus, where a ship went into port in distress, and wanting repairs, it became necessary to take out the cargo; and, there being no warehouses at hand, it was put on board other vessels: Lord *Stowell* said, that, as the unloading of the goods was for the common benefit of all, it being necessary to unload the ship for the preservation of the cargo, as well as for its own repair, the expense incurred by it must be considered as general average." The cases the learned author cites for this position, are, *The Copenhagen* (*a*), *Da Costa* v. *Newnham* (*b*), and *The Gratitudine*. (*c*) On referring to *Da Costa* v. *Newnham*, I find it laid down, that, where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care it, and the wages and provisions of the workmen hired for the repairs, become general average. But it has since been determined otherwise. The learned author then goes on,—"Thus, if it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her

(*a*) 1 *Rob. Adm. Rep.* 289.
(*b*) 2 *T. R.* 407.
(*c*) 3 *Rob. Adm. Rep.* 257.

to prosecute and complete her voyage, it has been held that the expense of unloading, warehousing, and re-shipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage." The reason there assigned might be applicable to the case the author had in his mind,—*Plummer* v. *Wildman* (*a*); but, as a general proposition, it is too large; it would throw upon the shipper much of the expense which properly belongs to the ship-owner. In that case, there were undoubtedly some expressions of Lord *Ellenborough* which would seem to justify the passage: but, in the subsequent case of *Power* v. *Whitmore* (*b*), his lordship explains that that decision proceeded upon the ground that the master "was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed." The expressions, therefore, in *Plummer* v. *Wildman* are repudiated and explained away. The result of these cases is thus summed up in *Abbott* on Shipping, p. 497,—"It seems to result from these decisions, that, if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port-charges, wages, and provisions during the stay, are to be considered as general average; but, if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the ship-owner, 'to keep his vessel tight, staunch, and strong,' during the voyage for which she is hired." In the following page, we find this passage,—"We have seen,

(*a*) 3 *M. & Selw.* 482. (*b*) 4 *M. & Selw.* 141.

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in a former part of this work, that a master may, under certain circumstances, borrow money on the security of his ship, or of its cargo; and that, if his vessel is disabled by the perils of the sea from carrying her cargo to its destination, he may, if he think proper, hire another vessel for that purpose. But, supposing him to be unable to raise money on bottomry, or by hypothecation of the cargo, and that no other vessel can be obtained, he is at liberty to sell part of the goods intrusted to him, to enable him, by repairing his ship, to carry the remainder to their destination. Goods thus sacrificed for the benefit of the owners of the rest of the cargo, seem to have been considered by Lord *Stowell*, in the case of *The Gratitudine* (*a*), and have been considered in other cases, to be the proper subject of a general average. The motive of the sale, in the case supposed, is no other than the motive for jettison. It is the same thing to the merchant whose goods are taken from his control, whether they are sold or thrown into the sea. In either case, it is a sacrifice submitted to by him for the benefit of all, and which ought, therefore, to be made good by general contribution." It seems to me that the fair import of what Lord *Tenterden* lays down, is, to exclude from general average damage like this. Here, the ship had returned to port. There was no immediately impending peril. It is true that the cargo could not have been carried to its destination by the particular ship, unless she were repaired. We had recently a case in this court, where it appeared that the vessel might have been sufficiently repaired so as to bring home about half her cargo, without absorbing the whole value of the ship and freight, when repaired,—and it was held not to be a case of total loss. (*b*) In the present case,

(*a*) 3 *Rob. Adm. Cas.* 257. (*b*) *Moss* v. *Smith*, *antè*, p. 94.

although it is stated that the cost of the repairs would exceed the value of the ship when repaired, it does not appear that they would have exceeded the value of *the ship and freight*. *Duncan* v. *Benson*(*a*) seems to me to go far towards deciding this case. There, the master of a ship damaged by perils of the seas, hypothecated at a foreign port, by one bottomry-bond, for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods. The ship and freight realised less than the sum borrowed, and the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the court of Admiralty by the obligee of the bond: and it was held that the plaintiff might maintain an action against the owner of the ship, on an implied promise to indemnify. One cannot help thinking that the claim for general average, if well founded, would not have escaped the counsel who argued that case. At all events the court considered it; for, in giving judgment, *Pollock*, C. B., says: "The owner of the goods is under no obligation to contribute to any expenses except such as constitute a general average, and that of the repairs in this particular case does not fall under that description."(*b*) The principle of that case applies very strongly here. When one considers how often ships have been hypothecated in foreign ports, in order to enable the master to bring them home, it is singular that it never should have been considered that bottomry interest could be made the subject of general average. I cannot think it could have been overlooked. I therefore think that the sale of part of the cargo under the circumstances stated upon this record, does not give any right to the owners to claim general average. Without, therefore, advert-

(*a*) 1 *Exch.* 537. (*b*) 1 *Exch.* 555.

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ing to the special grounds of demurrer, I think the pleas are bad, and the declaration good; and therefore the plaintiffs are entitled to our judgment.

CRESSWELL, J. I also am of opinion that the plaintiff is entitled to the judgment of the court upon this record. The first question arises upon the declaration. My Brother *Channell* did not struggle much to shew that the declaration did not disclose a good cause of action. It having been settled as a rule of law, that the master may under certain circumstances be justified by urgent necessity in selling a portion of the cargo, upon the terms of the owner's being paid the value of the part so sold at the port of discharge, I think the law implies a promise to the effect stated in this declaration. I also think that the two pleas demurred to, which are founded upon the claim to general average, are bad; no legal claim to average contribution arising upon the facts disclosed on this record. There has been no such loss as becomes the subject of general average. Damage done to the ship by stormy and tempestuous weather never yet has been held to be the subject of general average. The pleas adopt the description of the damage in the declaration. They then go on to say, that, in consequence of such damage, it became expedient and necessary for the vessel to put back to *Adelaide*. Could it be said at that time that there was an average loss? The only instance where this has been supposed to be so, prior to the case of *Plummer* v. *Wildman*, is, in the passage in *Beawes's Lex Mercatoria* (*a*), cited by *Buller*, J., in *Da Costa* v. *Newnham*, where it is said that "the charges of unlading a ship, to get her into a river or port, ought not to be brought into general average, but when occasioned by an indispensable necessity to prevent the loss of ship and cargo; as,

(*a*) Page 245.

when a ship is forced by a storm to enter a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost; in which case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel, to the day of her departure from it, with all the charges of unlading and relading, anchorage, pilotage, and every other due and expense occasioned by this necessity." But there was no authority in the English law, that I am aware of, until the case of *Plummer* v. *Wildman*, which undoubtedly does go to that extent. But Lord *Ellenborough* was in the next case that occurred anxious to protect himself from being thought to have intended to lay down the principle so largely: he qualifies and explains that case, in *Power* v. *Whitmore*, where he states the rule exactly according to what has always been, and still is, understood to be the law as to general average. And Lord *Tenterden* never meant to lay down the law larger than that. He refers, in *Abbott*, 8th ed. p. 475, to the Rhodian laws. "The rule of the Rhodian laws," he says, "is this: 'If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all.' The goods must be *thrown* overboard; the mind and agency of man must be employed; if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard *to lighten the ship;* if they are cast overboard by the wanton caprice of the crew or the passengers, *they*, or the master and owners for them, must make good the loss. The goods must be thrown overboard *for the sake of all;* not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the

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fault of those who had shipped or received the goods; but because, at a moment of distress and danger, their weight, or their presence, prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or is labouring on a rock, or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake; no measure that may facilitate the motion or passage of the ship can be really injurious to any one who is interested in the welfare of any part of the adventure, and every such measure *may* be beneficial to almost all. In such emergencies, therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship, for the sake of all. But, if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss." "From the rule thus established by the Rhodians, various corollaries have been deduced. Thus, if in the act of jettison, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution. So, if, to avoid an impending danger, or to repair the damage occasioned by a storm, the ship be compelled to take refuge in a port to which it was not destined, and into which it cannot enter without taking out a part of her cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also, being occasioned by the removal of the goods

for the general benefit, must be repaired by general contribution." That is, where part of the cargo is sacrificed for the purpose of lightening the ship, in order to get her into a port of safety. The learned author then speaks of the decision of Lord *Stowell*, in the case of *The Gratitudine;* and he goes on (*a*),—"Thus, if it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her to prosecute and complete her voyage, *it has been held* that the expense of unlading, warehousing, and re-shipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage." For this he refers,—and evidently with an expression of doubt,—to *Plummer* v. *Wildman*, which, as before observed, was afterwards explained by Lord *Ellenborough* himself. I never heard of general average of the nature disclosed by these pleas.

WILLIAMS, J. I am of the same opinion. It is important to bear in mind the principle upon which general average is grounded; and that is, that it would be unjust that the goods of one should be sacrificed for the benefit of all, and that one alone should suffer for the common safety. These pleas do not by any means shew that the copper in question was sold for the general benefit of all: their foundation, therefore, wholly fails.

TALFOURD, J., concurred.

Judgment for the plaintiffs.

(*a*) Page 478.

LEWIS v. SMITH and BROOKFIELD, Survivors, &c.

May 7.

In consideration of *A.'s* having consented and agreed with *B.* to allow his (*A.'s*) name to be placed on the list of the provisional committee of a projected railway company, and to take certain shares therein, and to pay deposits thereon, *B.* undertook and promised "to indemnify *A.* from all personal responsibility, and to hold him harmless against all costs, charges, and expenses which then had been, or might thereafter be, incurred in and about the formation of the company, their meetings, advertisements, surveys, and other expenses of carrying the company, applying for an act of parliament, or anything relating thereto." *C.*, an advertising agent, afterwards unsuccessfully sued *A.* in the Exchequer, for moneys paid for the insertion of advertisements in divers newspapers at the request of the secretary of the company:—Held, that the extra costs incurred by *A.* in the defence of that action were not costs, charges, and expenses incurred in and about the formation of the company, within the meaning of the indemnity.

THIS was an action of assumpsit. The declaration stated, that, before and at the time of the making of the promise thereinafter mentioned, of the defendants and *William Witham*, and in the lifetime of the said *William Witham*, and before the commencement of this action, a certain company was in the course of formation, that is to say, a company or association of persons called and known by the name of "*The Central Kent Railway Company*," and thereupon, before the commencement of this suit, to wit, on the 19th of *October*, 1845, in consideration that the plaintiff, at the request of the defendants and of the said *William Witham*, had, to wit, then consented and agreed with the defendants and the said *William Witham* to allow his, the plaintiff's, name to be placed on the list of the provisional committee of the said company, and also then agreed with the defendants and the said *William Witham* to take divers, to wit, fifty shares in the said company, and to pay the deposits on the said shares, subject to any arrangement to be thereafter made respecting the application of that and other deposits, upon the terms and understanding of the defendants' and the said *William Witham's* then undertaking, and promising him, the plaintiff, to indemnify him, the

plaintiff, from all personal responsibility, and to hold him, the plaintiff, harmless from and against all costs, charges, and expenses that then had been, or might thereafter be, incurred in and about the said formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto, they, the defendants and the said *William Witham*, then undertook, and promised the plaintiff, to indemnify him, the plaintiff, from all personal responsibility, and to hold him, the plaintiff, harmless against all costs, charges, and expenses which then had been, or might thereafter be, incurred in and about the said formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto: that, by reason and in consequence of the said consent and agreement so made as aforesaid, the name of him, the plaintiff, was, to wit, on the day and year aforesaid, placed on the list of the provisional committee of the said company; and that divers, to wit, ten thousand, advertisements of and relating to the said company had been published, made, and inserted in divers newspapers and otherwise, on divers days and times before the making of the said promise of the defendants and the said *William Witham;* and that divers, to wit, ten thousand, other advertisements of and relating to the said company had been published, made, and inserted in divers newspapers and otherwise, on divers days and times after the making of the said promise, and before the commencing the suit thereinafter mentioned, to wit, of one *George Reynell;* and that the said several advertisements had been and were so published, made, and inserted by the said *George Reynell*, and had been and were so published, made, and inserted in and about

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the formation of the said company; and that the costs and charges of the said *George Reynell* for and on account of the said advertisements so published, made, and inserted, amounted to a large sum, to wit, 700*l.*; and the same costs and charges were incurred in and about the said formation of the said company, and the carrying out the same company; and that, thereupon, the said costs and charges remaining and being unpaid, the said *George Reynell*, after the making of the said promise, and after the said advertisements had been so published, made, and inserted as aforesaid, to wit, on the 16th of *March*, 1846, commenced and prosecuted a certain action in Her Majesty's court of Exchequer of Pleas at *Westminster*, in the county of *Middlesex*, to wit, an action of debt, against the plaintiff, to recover against and from the plaintiff the said costs and charges of him the said *George Reynell*; and that the said action was commenced and prosecuted against the now plaintiff as aforesaid, for and by reason and in consequence of his, the plaintiff's, having consented and agreed to allow his, the plaintiff's, name to be placed on the list of the provisional committee of the said company as aforesaid, and of his said name being so placed as aforesaid (*a*); and that, although the defendants and the said *William Witham*, to wit, on the day and year last aforesaid, had notice of the premises, the defendants and the said *William Witham*, not regarding their said promise, did not nor would hold the plaintiff harmless from and against the said costs and charges so incurred as aforesaid; and that, by reason and in consequence thereof, the plaintiff was obliged to expend, and did expend, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, divers sums of money, amounting in the whole to

First breach.

(*a*) See *Reynell* v. *Lewis*, 15 *M. & W.* 517.

a large sum, to wit, 2000*l.*, in and about the said action, and in and about the defence of him, the plaintiff, thereto, and in and about the prosecution of a suit in Her Majesty's High Court of Chancery against the said *George Reynell, William Henry Smith, William Witham,* and *Charles Austin Brookfield,* rendered necessary and expedient by and by reason of the said action of the said *George Reynell,* which said sum, so expended as aforesaid, still remained wholly lost to the plaintiff; and was also, on the said days and times, forced to become liable, and did become and still remained liable, to pay divers other sums of money, amounting in the whole to a further large sum, to wit, 2,000*l.*, in and about and in relation to the said action and suit: And, for assigning a further breach of the said promise of the defendants and the said *William Witham,* the plaintiff said, that, although he, the plaintiff, was, before the commencement of this suit, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, obliged to expend, and did expend, divers sums of money, amounting in the whole to a large sum, to wit, 2,000*l.*, in and about the said action, and in and about the defence of him, the plaintiff, thereto, and in and about the said suit, and the prosecution thereof,—of all which premises the defendants and the said *William Witham* in his life-time, to wit, on the 1st of *March,* 1848, had notice; yet the defendants and the said *William Witham,* further disregarding their said promise, did not nor would indemnify him, the plaintiff, from all personal responsibility from and against the said costs and charges so incurred as aforesaid, but neglected so to do, and, by reason and in consequence thereof, the plaintiff had lost and been deprived of the said sums so expended as aforesaid: To the damage, &c.

Second breach.

Special demurrer, assigning for causes, amongst

Special demurrer.

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others, that the consideration for the promise in the declaration mentioned, is so stated as to render it doubtful whether the same were executed or executory;—that the said consideration is stated to have been an executed, and not an executory consideration, and yet it does not appear that the same had been so executed *at the request* of the defendants and the said *William Witham*;—that the consideration stated is insufficient in law to support the promise alleged, inasmuch as the plaintiff's having agreed to allow his name to be placed on the provisional committee, and to take shares in the said company as therein alleged, can form no sufficient consideration for a promise to hold the plaintiff harmless from and against all costs, charges, and expenses which had been or might be thereafter incurred in or about the formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto;—that it is not stated or alleged, nor doth it appear by the said declaration, that the plaintiff ever allowed his name to be placed on the list of the provisional committee of the said company;—that the recital of the plaintiff's having consented and agreed to allow his name to be so placed on the said list, is insufficient in that behalf, and that such allowance ought to have been positively and directly averred, with certainty of time, and other particularity;—that it is consistent with the said declaration, that his name was so placed on the said list adversely to, and without the licence, consent, or allowance of the plaintiff;—that it is not stated or alleged, nor doth it appear, that the plaintiff ever took shares in the said company, or paid the deposit thereon;—that it is not stated or alleged, nor doth it appear with sufficient or any certainty, that the said advertisements were reasonable, proper, or necessary advertisements, or that the same were inserted by the said company, or any person connected

therewith, or otherwise within the terms of the said promise;—that, as regards such as had been inserted before the making of the said promise of the defendants and the said *William Witham*, the declaration discloses no liability in the plaintiff to pay for the same, or in the defendants to indemnify him from the costs of the action in respect thereof;—that it does not appear that the plaintiff, the company, or any other person connected therewith, ever incurred any responsibility in respect of the said advertisements;—that it is not stated or alleged, nor doth it appear that the said *George Reynell* ever had any cause of action against the plaintiff in respect thereof;—that, the promise of the defendants being merely to indemnify the plaintiff from personal responsibility, and to hold him harmless from and against costs, charges, and expenses incurred in or about the formation of the company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto, the same does not extend to the costs, charges, and expenses in the said breaches in the declaration mentioned;—that the allegation that the action was commenced and prosecuted against the plaintiff for and by reason and in consequence of his having consented and agreed to allow his name to be placed on the lists of the provisional committee as aforesaid, is unintelligible and absurd, it being nowhere stated in the declaration that he had consented or agreed; and that, even if he had done so, still the same would not have rendered him liable to the said action, or been any legal reason or ground for the bringing of the said action against the plaintiff;—that the costs of the said action and suit, or the defence of him, the plaintiff, are not within the terms of the said promise;—that the said promise of the defendants must receive a reasonable construction, and cannot extend to all such costs, charges, and expenses as the plaintiff or

execution for the debt of the principal: so also, if the obligee be put in fear of arrest for the debt of the principal, and therefore dare not go about his business; by this the condition is broken. But, if the obligee be sued unjustly, either because he is sued before the money is due, or otherwise; or, if the bond in which he is bound be against law, and void, and he suffer himself to be unjustly vexed thereupon, it seems there is no breach of the condition of the bond to save harmless." The rule is analogous to that of a covenant for title, as to which the cases are collected in the notes to *Wotton* v. *Hele* (*a*), where it is said: "The law will never adjudge that a lessor covenants against the *wrongful* acts of strangers, except his covenant is express to that purpose; for, the law itself doth defend every man against wrong, and therefore, though one warrants land to another expressly, yet he does not defend against *tortious entries*." "But (*b*), where a person covenants to save harmless from all acts of a particular person, there he is bound to indemnify against the acts of that person, whether by title or not:" *Foster* v. *Mapes* (*c*); *Chaplain* v. *Southgate* (*d*); *Cruise* Dig. *Deed*, c. 24, § 55; *Nash* v. *Palmer*." (*e*) In this latter case, Lord *Ellenborough* says: "The rule has been correctly stated, that, where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world: but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has purposely restrained it within its reasonable import,

(*a*) 2 *Wms. Saund.* 177 *a* (8).
(*b*) *Ib.* note (*c*).
(*c*) *Cro. Eliz.* 212.
(*d*) 10 *Mod.* 384.
(*e*) 5 *M. & Selw.* 374.

relating to the premises were withholden by one *A. W.*, at the instance, and through the claim and demand of *B.* The defendant pleaded, to the first breach, that *A.* had no *lawful* claim or title to the premises,—and a similar plea to the second breach, as to *B.*; and it was held, on demurrer, that, *A.* and *B.* being named in the covenant, the indemnity extended to all claims made by them, whether upon lawful title or otherwise. If *Reynell* had been *named* in this covenant, that case would have been in terms the same as this: and it is submitted that the omission of the name makes no substantial difference.

Crompton, in reply, was stopped by the court.

CRESSWELL, J. (*a*) I am of opinion that the covenant to indemnify in this case must be construed in the ordinary way,—to indemnify the plaintiff against *lawful* claims. Taking the language most strictly, it cannot apply to this demand. The defendants contract to indemnify the plaintiff "from all personal responsibility, and to hold him harmless from and against all costs, charges, and expenses that then had been or might thereafter be incurred in and about the said formation of the said company, their meetings, advertisements, surveys, and other expenses of carrying out the said company, applying for an act of parliament, or anything relating thereto,"—defining the particular class of costs the indemnity was intended to apply to. Costs incurred by means of *Reynell's* action clearly are not included in it. It refers to costs and expenses in relation to the proceedings in forming and establishing the company. The declaration is bad in substance.

WILLIAMS, J., and TALFOURD, J., concurred.

Judgment for the defendants.

(*a*) *Wilde*, C. J., was absent.

plaintiff, and of him, the defendant, and the other members and co-partners of and in the said co-partnership,—verification.

Fourthly, that, before and at the time of the making of the said promissory note as thereinafter mentioned, there was, and thence until and at the commencement of this suit there continued to be, and still was, a certain co-partnership of persons using, and known by, the name of "*The Manchester Dog and Partridge Thirty Pound Money Society*," the names of which persons, except that of the defendant, were to the defendant unknown; that, before and at the time of the making of the said promissory note, as thereinafter mentioned, he, the defendant, was a member of and co-partner in the said co-partnership, and the plaintiff was, before and at the last-mentioned time, the treasurer and trustee of the same co-partnership; that the defendant, as in the first count mentioned, made and delivered the said promissory note to the plaintiff, as treasurer and trustee as aforesaid, for securing the repayment by the defendant to the said society, of a certain sum of money, to wit, the sum of 45*l.*, then advanced by the said co-partnership to the defendant, as such member as aforesaid, out of the funds of the said co-partnership, to be repaid by the defendant to the said co-partnership for and to the use of the said co-partnership; that he, the defendant, as in the declaration mentioned, made and delivered the said promissory note to the plaintiff, as such treasurer and trustee as aforesaid, for securing the re-payment by the defendant to the said society of a certain sum of money, to wit, the sum of 45*l.*, then advanced by the said co-partnership to the defendant as such member as aforesaid, out of the funds of the said co-partnership, for and to the use of the said co-partnership; that there never was any consideration or value

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for the said making of the said note, except as aforesaid; and that, at the time of the commencement of this suit, the plaintiff held, and still continued to hold, the said note, as treasurer and trustee of and for the said co-partnership, and commenced this suit, and then sued thereon, as such trustee on behalf and for the benefit of the defendant and the other members of the said co-partnership,—verification.

Demurrer, and joinder.

Cowling, in support of the demurrer. The pleas are bad. The grounds of defence here relied on are two,—first, a total absence of consideration for the giving of the note,—secondly, that, inasmuch as both the plaintiff and the defendant are interested in the funds of the partnership, the plaintiff is not in a situation to sue upon the note; being, in effect, both debtor and creditor. The first objection is clearly without foundation. It is perfectly consistent with the pleas, that the defendant received the whole 45*l.*; and the receipt of the money would be ample consideration for the note. To constitute a defence, the defendant should shew that the failure of consideration was such, that, if this were money, instead of a promissory note, he could have recovered it back as money had and received to his use. The case of *Stephens* v. *Wilkinson* (*a*) is very much in point. There, in an action by the payee against the acceptor of a bill of exchange drawn for the balance of purchase-money of articles bought at a sale, it was held to be no defence, that, two months after the delivery of the goods to the vendee, the vendor forcibly re-took possession of them; for, the vendee cannot treat that act as a rescinding of the contract, but must bring trespass. *Parke*, J., there says:

(*a*) 2 *B. & Ad.* 320.

"Assuming that *all* the goods were taken possession of by the vendor (which does not distinctly appear), to constitute want of consideration a defence to a bill of exchange, there must be such a total failure as would have enabled the vendee to recover back the whole money, if money had been paid instead of the bill. Total failure of consideration is, where the party has been deprived entirely of all benefit of the thing for which the thing was given; and then he might recover back the money paid, if there had been a money payment." Apply that here: if the defendant would have had no defence had this been money, he clearly has none to this note. So, in *Jones* v. *Jones* (*a*), in debt by the payee against the maker of a promissory note payable on demand, a plea that the note was given as and for the purchase-money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that no memorandum or note of the contract in writing was signed by the defendant, or any person lawfully authorised by him, and that there was not any consideration or value for the making or payment of the note, except as aforesaid,—was held bad on general demurrer. The plaintiff's right to sue upon the note is in no degree affected by the relative position of the parties. In *Sharp* v. *Warren* (*b*), it was held that assumpsit for money had and received may be maintained against one who had been a member of a benefit club, for money intrusted to his keeping by the rest of the society, in the name of the officers properly appointed for managing their affairs, under the articles; and it is no objection to such an action, that the defendant was a partner or tenant in common. In *Jackson* v. *Stopherd* (*c*), *Bayley*, B., says: "Upon the general rule of law there is no difficulty.

(*a*) 6 *M. & W.* 84.
(*b*) 6 *Price*, 131.
(*c*) 2 *C. & M.* 361.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

1850.

IN

Trinity Term,

IN THE

THIRTEENTH YEAR OF THE REIGN OF VICTORIA.

THE JUDGES WHO SAT *IN BANCO* DURING THIS TERM WERE — WILDE, C. J., CRESSWELL, J., MAULE, J., AND TALFOURD, J.

HUDSPETH *v.* YARNOLD.

May 22.

DEBT, for 50*l.* due for wages. The defendant, as to 15*l.* 6*s.* 8*d.*, pleaded non-joinder of *J. K.*, a co-debtor; and, as to the residue, *nunquam indebitata.*

At the trial before *Wilde*, C. J., at *Westminster*, after the last term, it appeared that the plaintiff acted at the

A., the manager of a theatre, by letter, proposes to *B.*, an actor, an engagement at 2*l.* per week, determinable by a month's notice. *B.* performs under this proposal. Notice is given by letter to *B.* to determine the employment, unless *B.* will consent to a reduction of salary. In a third letter, *A.* writes, "I have received your letter, and upon re-consideration, will give you the same terms, 2*l.*, for the summer season." Held, that the first and third letters contained merely proposals, and that as no agreement was constituted between the parties until those proposals had been expressly accepted, or tacitly acquiesced in, by *B.*, the correspondence was admissible in evidence without an agreement stamp.

In debt for 50*l.* the defendant pleaded as to 15*l.* 6*s.* 8*d.* non-joinder of a co-debtor, and as to the residue, never indebted. The defendant obtained a verdict upon the non-joinder. As to the residue, the plaintiff proved a debt for 35*l.* 5*s.* 8*d.*, reduced by payments to 11*l.* 5*s.* 8*d.* Held, that the defendant was entitled to a suggestion to deprive the plaintiff of costs, under the County Courts Act, 9 & 10 *Vict. c.* 95. *s.* 129.

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Pavilion Theatre, of which the defendant was manager, from *Christmas*, 1848, to *May*, 1849, when the defendant took *J. K.* into partnership; and that the 15*l.* 6*s.* 8*d.* mentioned in the plea was for services performed during the partnership. To prove his title to salary for twenty-two weeks at the rate of 2*l.* per week, the following letters were offered in evidence:—

"17th *November*, 1848.

"Sir,—If you are disposed to take a weekly salary of 2*l.*, and a clear half-yearly benefit, I think I could receive you at *Christmas*, provided the terms suit you and a month's notice on either side in case of separation. I beg to apologise for not answering a former application. Perhaps you will be more polite, and let me have your reply.

"*Emma Yarnold.*"

"14th *April*, 1849.

"Sir,—I am desired by Mrs. *Yarnold* to inform you, that * * * she can only offer you for the ensuing summer season, the sum 1*l.* 10*s.* per week. Should this not meet your views, Mrs. *Y.* is reluctantly compelled to inform you that your services will not be required after the 26th *June*, 1849. An answer is required not later than the 18th of *April.*

"*Charles Gerrard*, for
"Mrs. *Yarnold.*"

"21st *April*, 1849.

"Sir,—I have received your letter, and, on reconsideration, will give you the same terms, 2*l.* per week, for the summer season.

"*Emma Yarnold.*"

It was objected that these letters could not be read for want of a stamp.

This objection was overruled, and the plaintiff obtained a verdict for 11*l.* 5*s.* 8*d.*, being the amount of sa-

; 2*l.* per week, after deducting the 15*l.* 6*s.* 8*d.*, the defendant was not solely liable, and to the amount of 24*l.* made on account. reserved to the defendant to move to enter a the court should be of opinion that the e not admissible in evidence under the cir-

ɜr term, *Hawkins* obtained a rule nisi to enter ɔr a suggestion to deprive the plaintiff of costs County Courts Act. (*a*)

w shewed cause. The first letter contained accompanied by a request that the plaintiff y to it. The proposal appears to have been on the part of the plaintiff, either expressly ɔr tacitly by acting under it. But such ac- would not have the effect of converting the ɜself into an agreement requiring a stamp. agreement between the parties would con- of the proposal in writing, and partly of rinsic of the writing; *Vollans* v. *Fletcher.* (*b*) ɜe, a letter of allotment of shares in a railway ɾas held not to require a stamp, the contract complete until acceptance of the allotment, ɩde in answer to an application for shares. d letter merely contains a notice for deter- then current engagement. The third letter ɩews the original proposal. There was no etween the parties until that proposal was either expressly or tacitly. [*Maule,* J. Is ɩ case in the Exchequer Chamber in which a

10 *Vict.* *c.* 95.

ɜch. 20; 16 *Law* ɜch.) *N. S.* 173. tion in that case ɜnty shares in the , *West Bromwich,* &c. *Junction Railway,* the letter of allotment gave ten only, and imposed special terms, to which there had been no allusion in the plaintiff's letter of application.

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letter of allotment of railway shares was held to be receivable in evidence without a stamp?] That is the case of *Moore* v. *Garwood.* (*a*)

Again, to make a stamp necessary, the instrument must, upon the face of it, refer to a matter exceeding the value of 20*l.* The engagement might last only a few weeks; it might be put an end to at any time by giving a week's notice.

With respect to that part of the rule which prays for the entry of a suggestion under the County Courts Act, the first objection is, that the affidavit is insufficient. Where an affidavit describes the deponent as a party to the suit, it may not be necessary to give the addition of the deponent, but the place of residence, here omitted, should appear. In *Sharpe* v. *Johnson* (*b*), *Tindal,* C. J., observes: "The object of that rule (*c*) was to make the opposite party acquainted with the residence of the deponent; but I am of opinion that it does not apply to the case of a prisoner. He is, in effect, on the floor of the court; and it would be absurd to require him to state his residence, when the plaintiff, by opposing his discharge, must know where he is." [*Maule,* J. The object of the rule is to identify parties. Is it not the general practice merely to describe the plaintiff and the defendant as "the above-named plaintiff and defendant?" What rule is there which requires a plaintiff, every time he makes an affidavit, to shew where he resides? The learned judge referred to the case of *Shirer* v. *Walker.* (*d*)]

This is not a case in which the plaintiff might have brought his action in the county court. In those courts, a plea in abatement for non-joinder is not

(*a*) 19 *Law Journ.* (*Exch.*) *N. S.* 15.

(*b*) 4 *Dowl. P. C.* 324.; *S. C.* 2 *New Cases,* 246.; 2 *Scott,* 407.; 1 *Hodges,* 298

(*c*) *Reg. Gen. H. T.* 2 *W.* 4, s. 5.

(*d*) 2 *M. & G.* 917.; 3 *Scott, N. R.* 255.

At the time the action was commenced, it ıght for more than 20*l.* The jury gave him ›nd the 15*l.* 6*s.* 8*d.* With regard to the latter plaintiff's right of action in this court is sus- ıntil the co-debtor is joined as a co-defendant. ect. 68. of 9 & 10 *Vict. c.* 95., a demand is re- ; in the county court without serving or suing ointly answerable. The debt, therefore, to be in the county court, would have exceeded 20*l.* *ll*, J. How do we know that the debt is so you suggest?] The record shews an admission ; of 15*l.* 6*s.* 8*d.*; the plea alleges only matter of payment. [*Cresswell*, J. Does the plea e debt?] It does. (*a*) [*Maule*, J. The de- now says you should have sued me and my 'or 15*l.* 6*s.* 8*d.*, and myself alone for 11*l.* 5*s.* 8*d.*] efendant had not pleaded in abatement, it is plaintiff must have recovered more than 20*l.* ›a is not in avoidance of the debt, but in delay medy.

er objection to this application is this. The tion of 9 & 10 *Vict. c.* 95., enacts: "That all personal actions, where the debt or damage is not more than 20*l.*, *whether on balance of or otherwise*, may be holden in the county

to this point, see *Lasbury*, 1 *C. M. &* *S. C. per nom. Gould* *ry*, 2 *Dowl. P. C.* that case it was said, that, "A plea in need not confess and 'he defendant is not raverse or confess all s alleged. He has at nothing to do but to the plaintiff may have rit; and the judg- ıot to be that the to recover or not on the allegations upon the record, but that the writ be quashed, or that the defendant answer over." That is true with respect to a judgment on demurrer; but if in an action of debt, issue be joined upon a plea in abatement, and that issue is found for the plaintiff, the judgment is *quod recuperet.* As there is in such a case no verdict finding a debt, this judgment would appear to rest upon an express or implied confession of the debt demanded,

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court." There is no decision upon this point in the superior courts (*a*); but in the county courts it has been held, that the balance of account for which a plaint will lie in the county court must be a balance struck, and not a balance to be ascertained. Suppose a builder's bill to be reduced by payments below 20*l.* To recover anything, the plaintiff might be required to prove work done to the amount of several hundreds of pounds. It is otherwise when a balance has been struck; in which case it is not necessary to go beyond proof of the striking of the balance. The title of the act is, "for the more easy recovery of *small* debts and demands."

Hawkins and *Prentice contrà.* If the agreement appear, *primâ facie,* to relate to a matter of the value of 20*l.*, a stamp is necessary. Here, the agreement was an agreement for a year at 2*l.* a week, though the amount might be reduced by the notice to less than 20*l.* [*Maule,* J. Is there any authority for that?] *Shephard* v. *Whible* (*b*) shews that it is not necessary that the contract should ultimately operate as an agreement for more than 20*l.* Here, the parties might, if they thought proper, have reduced the amount; but, until that was done, the yearly agreement remained. [*Maule,* J., referred to *Laythoarp* v. *Bryant.* (*c*)]

(*a*) *Post,* 432, 433.

(*b*) 8 *Carr & P.* 534.

(*c*) 2 *New Cases,* 735.; 3 *Scott,* 238.; 2 *Hodges,* 25. In that case it was held, that a contract for the sale of an interest in land, signed by the purchaser only, was, as against him, a sufficient note or memorandum of the agreement, to satisfy the requirement of the fourth section of the Statute of Frauds, on the ground that the signature of the vendor was not essential to the completeness of the contract when the action was against the vendee.

The Statute of Frauds, every line of which has been said (first possibly by some practitioner on laying down his fee-book) to be worth a subsidy, is loosely worded; as if the rough draft of the bill had been transferred at once to the statute roll. The fourth sec-

e letter of 21st *April* is an agreement. [*Maule*, J. ; is it in answer to? It may be that the terms proposed by parol, or that the letter referred to ı stamp. You must shew, not merely that the ıg may have been one that required a stamp, but it did require one.] *Webb* v. *Spicer* (*a*) shews an agreement in writing, if acted upon, need not ;ned. The judgment in that case was reversed in but upon another ground. [*Maule*, J. There the ıg did purport to be the agreement of the parties.] ıtherwise if it appear to be merely an offer. [*Cress-*

ıeaks of "any *contract or* f any land, &c." mean- perhaps, "any contract : sale." The words "the ; to be charged," were ıly used by the framer bill, as equivalent to the , "the parties *chargeable*," ı *Laythoarp* v. *Bryant*, ı many other cases, the without assigning any for so doing, have re- the words "to be," and read the words "the *to be* charged," as if they ;en "the party actually d *in the action*." It has een held that the words *ıarties* to be charged," in 7th section, mean, not ıarties, but the *one party* d in the action.

Laythoarp v. *Bryant*, l, C. J., says (2 *New* 745.), "But then it is nless the defendant signs s no mutuality. Whose ; that? The defendant have required the ven- ignature to the contract." ns here to be intimated e omission by the vendor, nply with the require- of the statute, was the fault, not of the party omitting, but of the party to be prejudiced by the omission, and that the defendant, before he ventured to become a purchaser, ought to have made himself master not only of the Statute of Frauds, but of the conflicting rulings in the courts of law and of equity upon its provisions, and that having done that, he should have shaped his course in strict accordance with these decisions, some of which it may be difficult to reconcile with justice or grammar. It is said that mutuality of agreement is sufficient without mutuality of remedy; but if agreements are to be construed with reference to the apparent or presumed intention of the parties, it seems to be allowable to doubt that it was the intention of the parties that one of them should bind himself whilst the other remained unbound. And see *Walker* v. *Constable*, 2 *Esp. N.P.C.*, 659. 1 *Bos. & Pull.* 306.; *Ferrer* v. *Oven*, 1 *Mann. & R.* 223.

(*a*) 18 *Law Journ. Q. B.*, 142.

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well, J. Suppose parties talk over the terms of an agreement in the morning, and in the afternoon one of them writes: "I agree to the terms we talked over in the morning." Would that be an agreement in writing? *Maule*, J. The difficulty here is, that the letter of the 21st *April*, says: "I have received your letter, and, on reconsideration, will give you the same terms, 2*l.* per week, for the summer season." That might be understood as importing that there was a letter, or as inferring something substituted for the letter, or that the letter is necessarily part of the agreement. You say that that letter should have been stamped. *Cresswell*, J. Suppose the plaintiff had never served the defendant for the summer season, and she had brought her action for a breach of contract, could she have recovered?] She must have shewn that *Hudspeth* assented; and that assent might have been by parol or by act done.

The objection to the affidavit is answered by the known practice. [*Maule*, J., referred to *Moore* v. *Garwood* (*a*), and *Drant* v. *Brown*. (*b*)] Here, the letters were offered at the trial to prove the agreement. [*Maule*, J. That was the case also in *Drant* v. *Brown*. It is what always must be done when a written proposal is accepted by parol. It is only when the *whole* agreement is in writing that a stamp is necessary.]

The plaintiff has only recovered 11*l.* 5*s.* 8*d.* The debt owing by the defendant alone was, it is true, originally more than 20*l.*; but it had been reduced below 20*l.* by payments made before action brought. There was, therefore, nothing to prevent the plaintiff's from suing the defendant in the county court for the amount which he has recovered, that being a debt distinct from

(*a*) 19 *Law Journ.* (*Exch.*) *N. S.* 15.

(*b*) 3 *B.* & *C.* 665.; 5 *D.* & *R.* 582. And see *Bowen* v. *Fox*, 2 *M.* & *R.* 167.; *Bethell* v. *Blencowe*, 3 *M.* & *G.* 119.; 3 *Scott*, *N. R.* 568.; *Chanter* v. *Dickinson*, 5 *M.* & *G.* 253.

the sum due from the defendant and *J. K.* jointly. *Walker* v. *Watson* (*a*), *Chitt.* by *Archbold*, 1401.

WILDE, C. J. As to the plaintiff's first point, I have no doubt that the letter of the 21st *April* was a mere proposal, requiring some act to shew assent, to constitute an agreement between the parties. It is clear that upon these letters alone no action could have been maintained.

As to the second point, the particulars delivered shew that the action was brought to recover 22*l.*, reduced by payments to something about 12*l.* This is, therefore, a case in which a verdict has been found for the plaintiff for a sum less than 20*l.*, entitling the plaintiff to have judgment for the sum recovered, and no costs, under the 129th section of the County Courts Act. (*b*)

MAULE, J. I am of the same opinion. Here there was a proposal on the part of the defendant to pay 30*s.* per week. After this she offers 40*s.* a week. If the plaintiff chose to accept those terms, there would be an agreement. So if, without saying anything, he entered into her service, *Drant* v. *Brown* and *Moore* v. *Garwood* shew that a proposal not accepted in writing, does not require a stamp. Here the true construction of the letters is, that this amounted merely to a proposal.

As to the suggestion, it appears that the plaintiff served the defendant alone a certain number of weeks at 2*l.* per week, and had received as much as reduced

(*a*) 8 *Bingh.* 414; 1 *Moore* & *Scott*, 674.

(*b*) See *Woodhams* v. *Newman*, 7 *C. B.* 654.; *Beswick* v. *Capper*, *ib.* 669.; *Avards* v. *Rhodes*, 22 *Law Journ.* (Exch.) V. *S.* 106. In the last case it is reported that the judge of the county court gave a *judgment* of nonsuit in a case in which he held, and correctly held, that he had no jurisdiction; but this point does not appear to have been argued or noticed.

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the claim to about 12*l.* That was a demand for which the plaintiff might have clearly recovered in the county court.

CRESSWELL, J., and TALFOURD, J., concurred.

Rule discharged as to the nonsuit, absolute as to the suggestion.

CANNAN and GRIMLEY Assignees of TANNER a Bankrupt *v.* HARTLEY.

A. is tenant to *B.* of rooms, for a term of years. Upon the bankruptcy of *B.*, *A.* sends the key of the rooms to the office of the official assignee, where it is left with a clerk, who is told that it is the key of the rooms which *A.* had occupied. *A.* immediately quits possession, and no further communication takes place. Held, not to amount to a surrender by act or operation of law. (*a*)

ASSUMPSIT for six quarters' rent, accruing due to the plaintiffs, as assignees, on the 29th of *September*, 1849, on a demise of rooms, apartments, fixtures, chattels, and effects, by the bankrupt, for three years from 25th of *March*, 1847, with a count on an account stated with the plaintiffs as assignees.

(*a*) A surrender by act and operation of law takes place when the tenant of a particular estate becomes party to an act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues. See the cases collected, *Com. Dig.* tit. *Surrender* I.; 20 *Vin. Abr.* tit. *Surrender* F. G. In these cases the presumed surrender is also presumed to have *preceded* the act to which the tenant is party.

In some recent cases, the courts, more and more unwilling to frustrate the intentions of the parties by a strict adherence to the Statute of Frauds, have gone beyond this, and have held that an act, the direct and the only operation of which is, to extinguish the particular estate, an act done *ipsissimo animo sursumreddendi*, and differing in nothing from an express verbal surrender except by its informality, may be treated as creating a surrender by act and operation of law — a construction tending to make

Plea, first, non assumpsit; secondly, to the first count, that after the plaintiffs became assignees, and before any part of the money in the first count became due, to wit, on &c., the defendant surrendered and yielded up to the plaintiffs as assignees the said rooms, apartments, fixtures, chattels, and effects, and the plaintiffs as assignees then accepted (*a*) of such surrender, and took possession of such rooms, &c., and from thence hitherto have had possession thereof; thirdly, to the first count, that after the making of the promise, and before any part of the moneys therein mentioned became due, to wit, on, &c. the defendant was evicted from the rooms, &c., by *Erasimus* (*sic*) *Wilson*, of whom *Tanner* before he became bankrupt, and the plaintiffs as assignees since his bankruptcy, held the rooms, &c. as tenants thereof, and the

the exception nearly co-extensive with the enactment, and recalling the times when—as was the fate of the statute *De Donis*—an act of parliament might be repealed by judicial astuteness. An unqualified statement of this principle occurs in *Lynch* v. *Lynch*, (6 *Irish Law Rep.* 131.) where *Brady*, C. B., says, "A surrender by act and operation of law, I think, may properly be stated to be a surrender effected by the construction put by the courts on the acts of the parties, in order to give to those acts, the effect substantially intended by them."

(*a*) This allegation appears to be unnecessary, since without any *assent*, either expressed or implied, on the part of the surrenderee, the estate vests in him by the mere act of the surrenderor, until actual *dissent*. See *Thompson* v. *Leach*, 2 *Salk.* 618., and the note (*b*) in the sixth edition. *Thompson* v. *Leach* is also reported 3 *Lev.* 284., Lord *Holt*, 665., *Carthew*, 211. 250., 2 *Mod.* 290., 1 *Shower*, 296., *Freeman*, 502., 2 *Ventr.* 198. In that case it had been at first held in C. P., contrary to the opinion of *Ventris*, J., that assent on the part of the surrenderee, was necessary for the purpose of vesting the interest in him. And in *Townson* v. *Tickell*, 3 *B. & Ald.* 31., the Court of King's Bench, not being aware that the judgment in *Thompson* v. *Leach* had been reversed, acted upon the authority of the original overruled decision. *Vide* 4 *Mann. & R.* 189. n.

See also *Co. Litt.* 113 a, *Ibid.* 114 b., *Ibid.* 245a. b., *Ibid.* 337 n. 294., 2 *New Cases*, 70., 2 *Scott*, 128., 2 *Swanst.* 365. 371., 6 *B. & C.* 112., 9 *D. & R.* 136., 2 *N. & M.* 806., 3 *N. & M.* 775 n., 5 *N. & M.* 6. 2 *M. & G.* 690, 691., 6 *M. & G.* 456 n., 1 *Mylne & K.* 195., *Freeman* by *Smirke*, 503 n.

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defendant hath from thence hitherto continued so evicted; and that the said *Erasimus Wilson*, at the time he so evicted, had lawful title (*a*) to evict the defendant and the plaintiffs as assignees aforesaid. Verification.

Replication to both the special pleas, *de injuriâ*.

At the trial before *Maule*, J. at the *London* Sittings in last term, the plaintiffs proved a demise by *Tanner* before his bankruptcy, to the defendant, for three years, from the 25th of *March*, 1847, at 52*l.* 10*s.* per annum, payable quarterly. *Tanner* became bankrupt on the 10th of *March*, 1848. The rent was paid by the defendant to the assignees up to the 25th of *March*, 1848.

In *May*, 1848, the defendant sent the key of the rooms to the office of the plaintiff *Cannan*, the official assignee; and it was delivered to a clerk there as the key of the demised premises, and was never returned. On the same day the defendant quitted the premises, placing a tin-plate on the door giving information of his removal to another locality. No communication took place between the plaintiffs and the defendant until a little before Christmas 1849, when payment was demanded of the six quarters' rent now sued for.

In support of the third plea, certain proceedings taken by *William James Erasmus Wilson* (*b*), on the 4th of *October*, 1848, against *Tanner*, to obtain possession of the premises so deserted by *Tanner*, there being no sufficient distress on the premises, were produced; and it was shewn that at Christmas 1848 one *Elam* entered under *Wilson* and paid rent to him.

It was conceded, that upon the first issue the verdict

(*a*) In this plea it is not shewn how *Wilson's* title to evict arose. The defect would not be cured by a verdict; as a lawful title to evict might have been sufficiently proved by shewing an entry warranted by a forfeiture incurred by the defendant himself.

(*b*) The variance in the name—remaining unamended,—would appear to be fatal.

must be for the plaintiff. Upon the second issue it was contended, on the part of the defendant, that there had been a surrender by operation of law; and upon the third issue, that he was discharged by an eviction by *Wilson*, the landlord paramount.

The learned judge directed a verdict for the plaintiffs upon all the issues, reserving leave to the defendant to move to enter a nonsuit; but it was ultimately agreed that in case the court should be of opinion that there was any evidence of an eviction or of a surrender proper to go to the jury, a verdict should be entered for the defendant.

May 4.

In the same term *Edwin James* moved for leave to enter a verdict for the defendant upon the two special pleas accordingly. Upon the first point he cited *Dodd* and Another *v. Acklom* (*a*), where *A.* and *B.*, having demised a house to *C.* at a yearly rent payable quarterly, *A.*'s wife delivered the key to *C.*'s wife. *C.* entered and occupied. Before the first quarter's rent became due, *C.*'s wife delivered back the key to *A.*, who accepted it. This was held to amount to a surrender by act and operation of law within the exception in the third section of the Statute of Frauds.

There was evidence to go to the jury on the last issue.

WILDE, C. J. There is more doubt upon your second point; but you may take your rule upon both.

Rule *nisi*.

Byles, Serjt., and *J. M. Cobbett*, now shewed cause. There was no evidence which could have been properly left to the jury in support of any of the pleas. The sending of the key to *Cannan* was no surrender of the term; nor would it have amounted to a surrender even

(*a*) 6 *M. & G.* 672., 7 *Scott, N. R.* 415.

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if *Cannan* had been the sole lessee. But one co-lessor cannot accept a surrender; at least he cannot by such acceptance, determine the whole interest of the lessee. Then there was no proof that the clerk to whom the key was delivered, was an agent to accept a surrender.

The present application was founded upon *Dodd* and Another *v. Acklom*, which is at variance with all the cases before mentioned. In *Mollett* v. *Brayne* (*a*) the tenant quitted the premises with the assent of the landlord. This was held by Lord *Ellenborough*, to be no surrender of the tenant's interest, though he held only from year to year, and no answer to an action for use and occupation; and the court refused to grant a rule nisi for a new trial. So, here, the only act done by the tenant was, that he left the premises; there was no proof that the landlord went in. In *Doe* d. *Huddlestone* v. *Johnson* (*b*), A, tenant from year to year, after *Michaelmas*, gave notice to quit at *Lady Day*. The premises were relet to *B.* by auction, at which auction *A.* was a bidder. *B.* was not let into possession. Held, not a surrender by act and operation of law. [*Maule*, J. That was a simple attempt to repeal the statute by setting up a surrender by parol. In *Dodd* and Another v. *Acklom*, the facts raised a strong presumption that the landlord had taken possession.] The tenant wished to get rid of the premises, and the landlord accepted the key. [*Wilde*, C. J. The tenant deprived himself of the power of taking possession.] In *Lyon* v. *Reed* (*c*), the authorities were all carefully reviewed. Great doubt is there expressed as to the decision in *Thomas* v. *Cook* (*d*), and the cases founded upon it, including that of *Dodd* and Another v. *Acklom*; from which last case I hope, however, satisfactorily to distinguish the present. That

(*a*) *Campb.* 103.
(*b*) *M'Cl. & Young*, 141.
(*c*) 13 *M. & W.* 285.
(*d*) 2 *B. & Ald.* 119.

case, as to one important point, is more fully reported in 7 *Scott, N. R.*, 415. From that report it appears, that in consequence of the rent due to the superior landlord being considerably in arrear, that person had threatened to take proceedings before a magistrate for the recovery of the possession under 3 & 4 *Vict. c.* 84. *s.* 13., and had warned the defendant not to bring his goods there; and that the learned judge had told the jury, that the plaintiff was entitled to recover unless the defendant had made out to their satisfaction, *that he was, by the act of the plaintiff, prevented from having a beneficial occupation of the premises* (*a*), or unless the agreement had, by the consent of all parties, been put an end to before any rent became due.

In *Lyon* v. *Reed* (*b*) the Court of Exchequer appears to have considered that a demise by the reversioner to a stranger with the assent of the owner of the particular estate, does not amount to a surrender by act and operation of law. In the elaborate judgment pronounced in that case by *Parke*, B., after referring generally to the old authorities, his lordship says (*c*): "But in all these cases it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a *party* to the act which operates as a surrender. That he *agrees* to an act done by the reversioner, is not sufficient. *Brooke*, in his *Abridgment*, tit. *Surrender*, pl. 48. (*d*), questions the doctrine of *Frowike*, C. J., who says (*e*):

(*a*) This point would naturally have great weight with the jury; but, as it does not appear to have been noticed either during or after the argument, it cannot affect the decision as an authority upon the point on which the judgment proceeded.

(*b*) 13 *M. & W.* 285.

(*c*) *Ib.* 307.

(*d*) The placitum runs thus, "*Frowike*, chief justice: si mon termor agree que jeo fera feoffement a un estranger, ceo est un surrender. Et il dit que cet case est adjudge en nostre livers—Quære ubi; quia credo quod non est lex (21 *H.* 7. 7)."

(*e*) This was said by *Frowike*, by way of illustration, in answering a question upon a totally different point, upon which *Yaxley*, Serjt., had requested the opinion of the court.

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'If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender;' and says he believes it is not law. And the contrary was expressly decided in the case of *Swift* v. *Heath* (*a*), where it was held (*b*), that the consent of the tenant for life to the remainderman making a feoffment to a stranger, did not amount to a surrender of the estate for life. And to the same effect are the authorities in *Viner's Abridgment* (*c*), *Surrender*, F. 3. and 4. (*d*). * * * 'Before the Statute of Frauds, the tenant in possession of a corporeal hereditament, might surrender his term by parol; and, therefore, the circumstance of his delivering up his lease to the lessor, might afford strong evidence of a surrender *in fact;* but certainly could not, on the principle to be gathered from the authorities, amount to a surrender by operation of law, which does not depend upon intention at all." With respect to the first case in which it was suggested that there could be a surrender by a demise made to a stranger with the assent of the lessee, *Stone* v. *Whiting* (*e*), it is observed, that although *Holroyd*, J., intimated an opinion to that effect, there was no decision. After stating the decision in *Thomas* v. *Cook* (*f*), the judgment proceeds thus (*g*): "It is matter of great regret that a case involving a question of so much importance and nicety, should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested, which would have led the court to pause before they came to the decision at

(*a*) *Carthew*, 110.

(*b*) So decided upon a special verdict.

(*c*) Vol. 20. p. 128., translated from 2 *Roll. Abr.* p. 495.

(*d*) The cases in these particular placita, appear to have turned upon an *apparent* intention *not* to surrender.

(*e*) 2 *Stark. N. P. C.* 236.

(*f*) *Ib.* 408., 2 *B. & Ald.* 119.

(*g*) 13 *M. & W.* 308.

which they arrived. Mr. Justice *Bayley*, in his judgment, says the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit; an observation which forcibly shews the uncertainty which the doctrine is calculated to create." The cases have again been reviewed in a third edition of *Smith's Leading Cases* (*a*), in which the learned editors (*b*) point out the difficulties attending the construction now contended for. The point is still one of importance; for though by 8 & 9 *Vict. c.* 106. *s.* 3., a surrender *in writing* of any interest in any tenements or hereditaments,—not being a copyhold interest, and not being an interest which might have been created without writing, is void, unless made by deed, — the enactment leaves surrenders by act or operation of law, as they stood before. There is not any evidence that the assignees ever entered, as alleged in the plea. The evidence is just the other way; for the official assignee sent to demand the rent. *Nickells* v. *Atherstone* is a mere reiteration of *Thomas* v. *Cook*. Supposing that what took place in this case would have amounted to a surrender in the case of a sole reversioner, here we have two reversioners, *Cannan*, the official, and *Grimley*, the trade assignee. It is difficult to say what estate they took; as joint tenants must come in at the same time, and by one and the same title. (*c*) Assuming that these assignees were joint tenants, one alone could not accept a surrender. One joint tenant can do an act which is clearly for the benefit of the joint estate, but he cannot bind his companion by anything detrimental to the estate. [*Maule*, J. A surrender to one

(*a*) Vol. ii. p. 459.

(*b*) *Keating* and *Willes*.

(*c*) The estate of the assignees of a bankrupt is a *special* estate, a creation of the statutes relating to bankrupts. It has not all the incidents either of a common law joint tenancy or of a common law tenancy in common.

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joint tenant operates only upon *his* estate.] Here, the official assignee, the supposed surrenderee, was tenant in common with the trade assignee. In *Right* v. *Cuthell* (*a*) it was held, that a notice to quit signed by two out of three trustees to whom the lessee had assigned the term, was bad, even though given in the name of the three, and afterwards assented to by the third. (*b*) [*Maule*, J. When a surrender is made to one of two lessors, would the lessor not accepting the surrender, become tenant in common with the lessee?] He would (*c*); and in that case the rent would have to be apportioned. But the surrender is not so pleaded. The second plea states a surrender not of a moiety, but of the whole.

It was not proved that the landlord had entered in this case. The evidence is the other way; for the official assignee demanded the rent; whereas, in *Dodd* and Another v. *Acklom* there was some evidence that the landlord had entered. *Nickells* v. *Atherstone* is merely a repetition of *Thomas* v. *Cooke*.

Supposing the acts of the parties to be such as would justify the finding of a surrender in the case of a sole lessor, this case is different. There may be some difficulty in stating what the interest of the plaintiffs is. The titles of joint tenants must commence at the same time; but that is not the case with respect to official

(*a*) 5 *East*, 491., 2 *Marshall*, 83., 5 *Esp. N. P. C.* 149. In that case the agreement under which the notice was given, required that it should be under the hand *or hands* of the lessee, his executors, administrators, or assigns.

(*b*) These trustees were, at law, merely joint tenants, with all the incidents of a joint tenancy. They were not statutory assignees invested with a special character.

(*c*) *A.* and *B.*, seised in fee, jointly demise to *C.* for a term. *C.* surrenders to *A.*, who alone accepts the surrender. The immediate right of possession is now in *A.* and *C.*, as tenants in common; *A.* being seised of his moiety as tenant in fee in possession, *C.* being possessed of his moiety as tenant for years under *B.*, who is seised in fee of that moiety, subject to the possessionary interest of *C.*

and trade assignees. One joint tenant may do an act for the benefit, but not an act to the detriment of the joint estate. As a surrender to one joint tenant operates only upon *his* estate, the surrenderee would in such case become tenant in common with the surrenderor; *Rudde* (or *Rud*) v. *Tucker*. (*a*) [*Maule*, J. That was a case of a surrender by one of two joint lessees; here, the surrender is *to* one of two reversioners.] In *Right* d. *Fisher* v. *Cuthell* (*b*) it was held, that a notice given by two out of three joint devisees of the lessor was insufficient. It is true that there the proviso in the lease for twenty-one years, giving power to determine it at the end of fourteen years, required the notice by landlord or tenant, or their respective heirs, executors, &c., should be "in writing under his or their respective hand or hands;" but the principle upon which the judgment proceeds is not confined to the particular circumstance of the case. [*Maule*, J. In the case of a surrender to one of two lessors, will the lessor not accepting the surrender become tenant in common with the lessee?] He would (*c*). The party

(*a*) *Cro. El.* 737. 802., *S. C. per nom. Tooker's Case*, 2 *Co. Rep.* 62., the names being locally *idem sonantia*. And see 6 *M. & G.* 677.

(*b*) 5 *East*, 491. And see *S. C.* 5 *Esp. N. P. C.* 149., 2 *J. P. Smith*, 83. In the latter report it is said that the words "under their respective hand or hands," were not in the plaintiff's brief. It is more likely that they were omitted there for brevity or by carelessness, than that they were interpolated in the defendant's brief, and then argued upon as if they had been in both.

In a lease *at will*, if there be two lessors and one lessee, or one lessor and two lessees, the discontinuance of the will, on the part of any one of the three parties, would put an end to the tenancy. So it would be in the case of a demise *at will de anno in annum*; the tenancy, though classed among estates for terms of years, being substantially and in truth an interest to continue *quamdiu ambabus partibus placuerit*—subject to a renunciation of the right to determine the will except at particular periods.

And see *Doe* d. *Whayman* v. *Chaplin*, 3 *Taunt.* 120.

(*c*) It would rather seem that the party to whom the surrender was made, and who

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setting up the act must shew that it was for the benefit of the estate; *Rud* v. *Tucker*. Supposing the surrender to be good, its greatest effect would be, not to extinguish the rent, but to make it apportionable. Here, the plea is, not of a surrender of a moiety, but of a surrender of the whole.

The clerk is not shewn to have had any authority to receive the key. [*Wilde*, C. J. I suppose that is meant to be inferred from the circumstance of the key being retained. *Maule*, J. In *Co. Litt.* 192 *a*. it is said, "If such a lessee (speaking of a lessee under a lease from two joint tenants) for life should surrender to one of them, it shall enure to them both; for they that have a joint reversion." (*a*)] No doubt that is so if the other consents. (*b*) [*Maule*, J. So again in *Co. Litt.* 214. "a surrender to one joint tenant shall enure to both."]

With respect to the issue on the alleged eviction, the facts do not support the plea. These facts do not occur till after some part of the rent sued for had become due. The words of the plea, "before any part of the rent became due" are material, and the dates of the transaction disprove that allegation. [*James*. I admit that this plea can go only to half a year's rent.] The plea is pleaded to the whole demand. [*Maule*, J. Cannot this issue be found distributively?] The jury were bound to return a verdict affirming or negativing the eviction alleged. They could not have found eviction as to some quarters and no eviction as to others. Sup-

had thus acquired the immediate right of possession, would become tenant in common with the surrenderor.

(*a*) The authority referred to by Lord *Coke* is not confined to cases where the lessors are joint-tenants; it extends to all persons making a joint demise for life. "If two men lease land for a term of life, reserving rent to one, both shall have the rent, because the lease is joint by them; and the law is the same, if the tenant surrender to one of them, the other shall enter." *T.* 5 *E.* 4, fo. 4, pl. 7.

(*b*) Not only the consent, but even the knowledge, of the co-lessor, appears to be immaterial. *Ante*. p. 635.

pose the case of a plea of release instead of a plea of eviction. [*Maule*, J. That would be by deed, of which there would be profert.] Then put the case of a plea of accord and satisfaction, which requires no deed. [*Maule*, J. But it is an entire plea. Some pleas may be taken *distributivè*, as for instance, the plea of set off. (*a*) *James* admits that the verdict upon this issue must be against him, but says that the facts entitle the defendant to a reduction of damages.] There was no proof that *Erasmus Wilson* was the superior landlord, and came in by title paramount. The notice was not given to the right party. It was served upon *Tanner* the bankrupt; but at the time of that service he had ceased to be the owner of the term; it had passed to his assignees. Again, it merely appears that *Elam*, who was in possession, had been put in by *Wilson*, and that he had paid rent to *Wilson*. Even if *Wilson* was the superior landlord, there was no proof that the plaintiffs came in by him.

James, in support of rule. The court cannot discharge this rule without overruling the case of *Dodd* and Another v. *Acklom*. Here, as there, the key is delivered to one of the plaintiffs without anything being said by the receiver. [*Maule*, J. There, the key was accepted *simpliciter*.] Here, it is left as early as *May* 1848, at the official office of one of the plaintiffs; it is publicly stated where the defendant is gone, and the key is never sent back. A distinction is sought to be made on the ground that this is not an action for use and occu-

(*a*) A plea of set-off, being in the nature of a cross action, may be taken *distributivè* with respect to the several matters of set-off. It cannot be taken *distributivè* with reference to the matters *to which* it is pleaded. If in an action upon a bill of exchange for 500*l.* and a promissory note for 200*l.*, the defendant pleads a set-off for 1000*l.* in bar of the action generally, he cannot, upon proving a demand to the extent of 200*l.*, claim a verdict in respect of the promissory note,

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pation, but upon an agreement. That does not affect the validity of the surrender. In *Coote's Landlord and Tenant* (*a*) the following definition is given of a surrender by act and operation of law: "A surrender in law is where the parties, without any express surrender, do an act so inconsistent with the subsisting relation of landlord and tenant, as to imply an intention that the lessor should be in the same situation as if an express surrender had been made." (*b*)

The cases relied on for the plaintiff are the same as those cited in *Dodd* v. *Acklom* and Another, with the exception of *Lyon* v. *Reed;* and the authority of *Lyon* v. *Reed* is balanced by the late case of *Nickells* v. *Atherstone.* (*c*) In *Thomas* v. *Cook,* there was the substitution of a new tenant; but that was merely evidence of the acceptance of the surrender, with reference to which acceptance it is immaterial whether there was a substitution of a new tenant or the key was locked away in a

(*a*) p. 393.

(*b*) This definition appears to be too large. It would include every informal act showing an intention to depart with the immediate right of possession. Thus, if the tenant were to bring the key and say, "I surrender the premises which I hold of you," the surrender would be void by the Statute of Frauds; but if he laid down the key and had the prudence to be silent, confining himself to some renunciatory gesture sufficient to satisfy the jury of the existence of a *sursumredditionary* intent, there would be, *for the purpose of the cause in which the verdict was found,* and *to that extent only,* a valid surrender by act and operation of law.

It is said (*Coote,* 395.), that where a second lease for years was made to commence on the death of *J. S.*, it was holden to be no surrender of a former term, because *J. S.* might survive the term; but if *J. S.* should die within the term, then it would immediately operate as a surrender. The authority for this position is merely a loose note in 4 *Leon.* 30. Upon principle it would seem that the implied surrender would take effect irrespectively of the event, inasmuch as a recognition of the existence of a power of creating a lease to take effect immediately after the death of *J. S.*, disaffirms the continuing existence of a lease, which may continue after the death of *J. S.* And see *Ive* v. *Sams, Cro. El.* 521, 522.

(*c*) 16 *Law Journ.* (*Q. B.*) 371.; since reported 10 *Q. B.* 944.

drawer. So also, the fact as to the surrender being made to one of two lessors, is common to both cases. In *Dodd* and Another v. *Acklom*, it was held that acceptance of a surrender by one of two joint-lessors, operated as an acceptance by both. *Maule*, J. In that case it was not put on the ground that the surrender to one operated as a surrender to both, but that one acted for both.] Sending for the rent shortly before *Christmas* could not have the effect of rebutting the inference to be drawn from the conduct of the official assignee in retaining the key.

WILDE, C. J. The rule which has been obtained to enter a verdict for the defendent upon the second and third pleas, must be discharged. There was no evidence to go to the jury on the last plea. With respect to the second plea the facts are very simple. The defendant, upon finding himself in an inconvenient position in consequence of his immediate landlord having run away, is anxious to get rid of the premises. He leaves the key of the house at the office of *Cannan* the official assignee; but the only evidence of the acceptance of the key by *Cannan* is, that it was not sent back. (His Lordship then referred to the note in the third edition of *Smith's Leading Cases*, vol. ii. 359 *b.*) Nothing further occurs until *Christmas* 1849, when a demand of rent is made. The question is, whether there was evidence of a surrender and acceptance (*a*) upon which a verdict for the defendant could

(*a*) Some confusion appears to have been created in this case by treating the *acceptance* of the surrender by the surrenderee, as an ingredient of the surrender itself; the surrender, if valid at all, being necessarily complete antecedently to any agreement or acquiescence on the part of the surrenderee, the effect of whose acceptance of the surrender would be merely to deprive him of the power of subsequently *disagreeing* to the surrender and of thereby rendering void *ab initio* that which, until disagreement, had created a complete, though defeasible, merger of the estate of the surrenderor. *Vide* 4 *Mann & Ryl.* 190.; 2 *M. & G.* 701 n.; 3 *M. & G.* 733 n.

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have been sustained, not whether there was a scintilla of evidence. I am of opinion that there was no evidence of a surrender and acceptance which could have been properly left to the jury, and that this rule must be discharged.

MAULE, J. I am of the same opinion. It is not necessary to consider whether the observations of the Court of Exchequer, in *Lyon* v. *Reed*, or those of the Court of Queen's Bench, in *Nickells* v. *Atherstone*, upon the law as laid down by this court in *Dodd* and Another v. *Acklom*, are to be adopted. But assuming our decision in that case to have been right, it will not avail the defendant in this case, the circumstances being essentially different. In *Dodd* and Another v. *Acklom*, the defendant had complained of the rent, &c., being in arrear. An interview taking place, the tenant gave back the key, and the landlord accepted it. The jury having found that this amounted to a surrender and acceptance, the court refused to disturb the verdict. In that case the jury has before them the fact that the plaintiff had accepted the key. Here, there is nothing but the fact of the key being brought to a clerk of the official assignee. It is contended, that he was bound to receive anything brought to the office for his master. That may be so; but it does not follow that this was an acceptance by the master. But it is said that the conduct of the official assignee in not returning the key amounted to an acceptance of it. I do not think that the official assignee was bound to seek out the tenant for the purpose of rendering back the key. In *Dodd* and Another v. *Acklom*, it was held that *Dodd* had authority to act for both. That sufficiently distinguishes that case from the present; and if the jury had found a verdict establishing a surrender and acceptance, such verdict would have been found upon mere

negations, and not upon evidence of anything done by the parties.

To support the third plea there was no evidence at all.

CRESSWELL, J. I am of the same opinion. The strongest case for the defendant is that of *Dodd* and Another v. *Acklom*. The observations of my brother *Maule* on the case clearly distinguishes it from the present. (*a*)

TALFOURD, J. concurred.

Rule discharged.

(*a*) Another not unimportant difference between *Dodd* and Another v. *Acklom* and the principal case, (adverted to in the argument *suprà* 639.), is, that the former was an action for use and occupation, with a plea of non assumpsit. That action was brought to recover "a reasonable satisfaction for the use and occupation of the tenements held and enjoyed," in respect of a period during which, with the assent of the plaintiff, all occupation by the defendant had ceased. To negative an implied promise of payment resulting from such a state of things, no surrender, either *de facto* or by act and operation of law, appears to be necessary. Whether the particular estate still had a continuing legal existence or not, it is clear that there was no actual or constructive (*Pinero* v. *Judson*, 6 *Bingh.* 206., 3 *M. & P.* 497.) possession. (*Burn* v. *Phelps*, 1 *Stark. N. P. C.* 94.; *Whitehead* v. *Clifford*, 5 *Taunt.* 518.; *Edge* v. *Strafford*, 1 *Crompton & Jervis*, 391.)

In the principal case, the action was on the demise; the occupation was merely an *incident;* the question between the parties was, whether the legal existence of the particular estate had been determined by a valid surrender, an acceptance of such surrender having been assumed to be necessary to its validity.

As this distinction was not noticed in the argument or in the judgment in *Dodd* and Another v. *Acklom*, it does not affect the decision in that case as an authority.

In *Creagh* v. *Blood*, 3 *Jones & Latouche*, 132., Sir *Edward Sugden*, C., expresses his disapprobation of the inroads which had been made upon the Statute of Frauds, with respect to surrenders. In that case his lordship says: "When the statute (of frauds) speaks of surrender by act and operation of law, it certainly alludes to those surrenders where the party, whether by estoppel or otherwise, accepts an estate inconsistent with the estate which he has."

May 25.

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It is in the discretion of the judge, subject to the reviewal of the court, to determine in what stage of the cause evidence may be produced.

In trespass for false imprisonment the defendant pleaded, that the plaintiff had stolen the defendant's chaff; he further pleaded that his chaff had been stolen, and that he had reasonable ground to suspect the plaintiff. (*a*) The plaintiff gave evidence, in the first instance, to account for her possession of chaff. The defendant's witnesses proved that the chaff in the plaintiff's possession was similar in quality to that lost by the defendant, and, *inter alia*, that in both there was linseed. Held, that the judge had rightly exercised his discretion in allowing the plaintiff to call a witness in reply to account for the presence of linseed in the chaff found in the plaintiff's possession.

FALSE imprisoment. Pleas—first, not guilty; secondly, that the plaintiff feloniously stole and carried away twenty bushels of chaff of the defendant; thirdly, that the defendant's chaff was feloniously stolen by some person unknown, and that the defendant had reasonable and probable cause for suspecting, and that he did suspect the plaintiff, with others, of the felony.

At the trial before *Wilde*, C. J., at the Middlesex Sittings after last term, it appeared that the plaintiff and her sisters occupied a house which had been previously occupied by their father, of whom the defendant rented stables attached to the house. Over the stables was an open loft, in which some corn and chaff had been left in a drawer by the plaintiff's father. The defendant believed that his horses had been robbed of their chaff; and from various circumstances he suspected the plaintiff and her sisters, chaff of a similar quality having been found in the drawer, and one of the plaintiff's having been seen coming out of the stable with chaff in her apron. The defendant sent for a policeman, who, upon the plaintiff and her sisters being charged by the defendant with feloniously stealing his chaff, took them into custody. Upon being brought before a magistrate they were discharged. Two witnesses

(*a*) As to this plea, *vide post*, 655. 658 n.

called by the plaintiff stated, that they had sold her chaff similar to that found in the drawer. It was also sworn that chaff of that quality had been seen in this drawer before the time at which it had been suggested by the defendant that he had been robbed of chaff.

The defendant produced witnesses, who pointed out marks shewing that the chaff found in the plaintiff's drawer corresponded with that belonging to the defendant, and mentioned in particular, that linseed was mixed with the chaff, which was said to be unusual.

In reply, the plaintiff's father was called to prove that several months before he had bought linseed, the invoice of which he produced, and that he sent it, mixed with chaff, to his daughters. It was objected, that this witness should have been called in the first instance. The learned judge, however, received the father's evidence and his invoice; and a verdict was returned for the plaintiff, with 28*l.* damages.

Corrie now moved for a new trial on three grounds. First, that there was no evidence to support the verdict on the first issue. There was nothing to connect the defendant with the prosecution beyond the identity of name. Secondly, the learned chief-justice misdirected the jury in leaving the charge sheet to them as evidence that the defendant gave the plaintiff into custody. That paper only shewed that the parties made a certain statement to the policeman. The act of the policeman, in taking the defendant into custody in consequence of that statement, is not a giving of the plaintiff into custody by the defendant. Thirdly, the evidence in reply ought not to have been received. In *Browne* v. *Murray* (*a*) the plaintiff, after proving the publication of a libel, called a witness to disprove certain

(*a*) *Ryan & Mood.* 254.

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facts alleged in a plea of justification. After the defendant had given evidence in support of his plea, the plaintiff proposed to call another witness to disprove other facts alleged by the defendant in his justification. (*a*) This evidence was rejected by *Abbott*, C. J., who said, "If the plaintiff at the outset, calls any evidence to repel the justification, he should go through all the evidence he proposes to give for that purpose, and shall not be permitted to give further evidence in reply. It is much more convenient for the due administration of justice, that this course should be adopted; otherwise, there will be no end of evidence on either side, as the defendant would be entitled again to call witnesses to answer those last called by the plaintiff."

In *Jacobs* v. *Tarleton* (*b*), which was an action against the indorser of a bill, the plaintiff made out a *primâ facie* case by proving the defendant's signature. In support of a plea traversing the indorsement, evidence was given to shew that the plaintiff was too poor to have given value for the bill, and that he had denied that he knew anything of the bill or had authorised the bringing of the action. (*c*) Mr. Baron *Parke* refused to receive evidence in reply, that the plaintiff had possessed the means of discounting the bill, and had in fact discounted it. After time taken, the court held that Mr. Baron *Parke* was right in rejecting this evidence (*d*), saying, that the plaintiff might either rely upon a *primâ facie* case, or go into all the evidence he had to confirm that

(*a*) In support of which, he had, no doubt, given evidence.

(*b*) 11 *Q. B.* 421.

(*c*) From the report of this case in 17 *Law Journ.* (*Q. B.*) 194., it appears that there were pleas of fraud and covin, and want of consideration.

(*d*) The learned judge ruled that the plaintiff having made out a *primâ facie* case by proof of the indorsement, was bound to stand upon that case; that the defendant's evidence did not set up a new case, but was merely in answer to the plaintiff's *primâ facie* case. 17 *L. J.* (*Q. B.*) 195.

primâ facie case; but that he was not entitled to rely, in the first instance, upon a *primâ facie* case upon that issue, and afterwards, when that *primâ facie* case was called in question by the defendant, to call other evidence to confirm his *primâ facie* case; and that it was not proposed to call the witness to contradict any statement made by the defendant's witnesses, but to add a fact tending to support the plaintiff's *primâ facie* case. (*a*) [*Maule*, J. If the witness called by the plaintiff to prove an indorsement prove it weakly, and the defendant calls evidence to shew the improbability of the genuineness of the indorsement, the plaintiff cannot call a witness to prove that he saw the defendant sign it. If that were allowed, a plaintiff might call witnesses, and keep back one who it was supposed might, on cross-examination, disclose something which would damage the plaintiff's case.]

(*a*) This case, as reported in 11 *Q. B.*, is rather obscure. The issue raised upon the third plea was, whether the defendant indorsed the bill to the plaintiff. The affirmative might be proved either by evidence of a special indorsement by the defendant to the plaintiff, or by evidence of a blank indorsement by the defendant, coupled with possession by the plaintiff of the bill. If this issue had stood alone on the record, it could not have been contended that any other evidence ought to have been given in the first instance, whatever the nature of the defence, anticipated or unanticipated, might have been. It is difficult to understand why the evidence *on this issue* should be different where there are other issues upon the record. Nor indeed does it appear from the judgment, that the evidence given in support of the plea or that offered in reply, had the least bearing upon any other issue than that raised upon the third plea. The evidence given by the defendant in *Jacobs* v. *Tarleton*, would, if admissible, be so only as tending to shew that the blank indorsement signed by the defendant, did not operate as an indorsement *to the plaintiff*. According to the opinion of the court, *after deliberation*, the plaintiff was bound to produce, in the first instance, all the evidence which might eventually be useful in rebutting evidence which might be adduced to impugn the *primâ facie* operation of the possession of the instrument bearing the defendant's blank indorsement. Thus, if after proof of a blank indorsement of a bill produced by the plaintiff, it were shewn

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WILDE, C. J. The court is of opinion that no case has been made out for a rule to set aside the verdict on the ground of misdirection. As to the admissibility of the evidence in reply, the point is one of considerable importance. Upon that point, and upon that of the verdict being against evidence, you may take a rule.

June 4.

Edwin James, Q. C., and *Hawkins*, now shewed cause. The evidence in reply was properly received. The expediency of admitting evidence in reply must vary according to circumstances, and the court will not interfere with the course which the judge has, in the exercise of his discretion, thought it right to adopt, unless they can see that injustice has been done. When the plaintiff is apprised by the pleadings of the case meant to be set up by the defendant, and chooses to enter by anticipation upon part of that case, he must produce the whole of the evidence upon what he means to rely. In moving for the rule, *Jacobs* v. *Tarleton* was cited. (*a*) It is submitted that the decision in that case cannot be supported. *Marston* v. *Allen*. (*b*) [*Maule*. J. In *Jacobs* v. *Tarleton* the indorsement was not disproved by shewing that no consideration had been given. *Wilde*, C. J. The evidence may have been given for the purpose of shewing that the bill did not pass to the plaintiff by the indorsement proved. *Browne* v. *Murray* (*c*), merely shews that where the defence is known, the plaintiff cannot give some evidence to meet that defence, and reserve other evidence having

that the plaintiff had, on a day subsequent to that on which the indorsement had been written, been seen to pick the bill up in the street, he would be properly shut out from shewing that he had previously dropped it,— on the ground that such evidence should have been given in the first instance.

(*a*) *Suprà*, 652.

(*b*) 8 *M.* & *W.* 494., 1 *Dowl. N. S.* 442.

(*c*) *Suprà*, 651.

the same object, for his reply. So, in *Rees* v. *Smith* (*a*), *Delauney* v. *Mitchell* (*b*), *Greswolde* v. *Kemp* (*c*), 1 *Taylor, Evid.* 275. *b.*]

Corrie and *Prentice*, in support of the rule. Where the plaintiff at the outset goes into the proof of any issue, he must then produce all the evidence on which he means to rely with reference to that issue; more especially if he has notice of the case to be set up by the defendant. Here, the plea, charging the plaintiff with stealing the chaff (*d*) made it important to shew the ingredients of the chaff said to have been purchased of the father. The evidence in reply went merely to confirm the evidence given in chief; and *Rex* v. *Holditch* (*e*) shews that such confirmatory evidence was not admissible. In that case the prisoners were indicted for robbery. The defence set up was an *alibi* at a considerable distance from the spot where the robbery had been committed. For the prosecution a witness was called in reply to prove that he had seen all the prisoners near the spot. *Taunton*, J., said: "Proving that the parties were near the place at which the offence was committed, is evidence in chief and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply is that which goes to cut down the case on the part of the defence, *without being any confirmation* of the case on the part of the prosecution." [*Maule*, J. Is there any case in which a new trial has been granted on the ground that evidence, otherwise admissible, has been received at the wrong time?] There is no case in which a new trial has been applied for on that

(*a*) 2 *Stark. N. P. C.* 31.
(*b*) 1 *Stark. N. P. C.* 439.
(*c*) *Carr & M.* 635.
(*d*) *Vide post*, 658 n.
(*e*) 5 *Carr & P.* 299.

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ground and refused. *Ashby* and others, executors, v. *Bates* (*a*), was an action on a life insurance, where the policy was to be void if a statement that the assured had not been afflicted with rupture, was untrue. The declaration averred that the statement was true. Plea, that the assured had been afflicted with rupture. *Coltman*, J., allowed the defendant to begin. A verdict for the defendant was set aside on the ground that the plaintiffs ought to have been allowed to begin. (*b*) Here, the identity of the chaff was involved in the issue; and it was not an afterthought, as the father had come into court with the invoice in his pocket.

(*a*) 15 *M. & W.* 589., 4 *Dowl. & L.* 33. And see *Booth* v. *Millns*, 15 *M. & W.* 669., 4 *Dowl. & L.* 52.

(*b*) In that case, *Pollock*, C. B., is reported to have said, that "the plaintiffs were bound to give *some* evidence, however slight, of the truth of the statement; and *Alderson*, B., is reported to have said, "The plea, in truth, raises an issue which amounts to no more than this: whereas you, the plaintiffs, have alleged that the whole of this statement is true, I, the defendant, put you to prove that part of it in which the assured alleged that he was not, at the time the assurance was effected, so afflicted. But that was an issue, the first assertion of which was made by the plaintiffs. The defendant has contradicted what the plaintiffs affirmed; and the real issue is, whether what they have so affirmed is true. If it be true, it is for the plaintiffs to prove its truth." By this the *onus probandi* is placed upon priority of assertion, not upon the affirmative or negative quality of the proposition asserted. Thus, if it were necessary to allege in a declaration that *A. B.* had not committed forgery, and the defendant pleaded that he had, it would lie on the plaintiff to begin by *disproving* it.

Possibly no great injury was occasioned by the setting aside of the verdict in *Ashby* v. *Bates*. Not so in *Doe* d. *Bather* v. *R. Brayne*, 5 *C. B.* 655. In that case, the lessor of the plaintiff, a stranger in blood, claimed as devisee of *W. Brayne*. The defendants admitted the seisin of *W. B.*, and the due execution of the will, and that the plaintiff's lessor was, *primâ facie*, entitled under it, relying upon a second will, revoking the first. The defendants were permitted by *Gaselee*, Serjt., to begin,—the affirmative of the only matter in dispute lying upon them; and, establishing the second will, they obtained a verdict. This verdict was set aside on the ground that the admission was insufficient, inasmuch as it did not go to the extent of acknow-

WILDE, C. J., after stating that he was not dissatisfied with the verdict, said: I think the evidence in reply was properly received. The objection, is not to the admissibility of the evidence, but to the stage of the cause in which it was offered. Were that objection to prevail, there might often be a failure of justice. The time at which evidence is to be received, must be in the discretion of the judge, the exercise of that discretion being subject to the review of the court. In this case I cannot see that the admission of the evidence has led to any injustice. The rule, therefore, will be discharged.

MAULE, J. I also think that the rule should be discharged. I see no reason for granting a new trial on the ground of the verdict being against evidence.

The objection to the reception of the evidence was, that it was offered too late. It would be very inconvenient to hold this to be a sufficient ground for setting aside a verdict. Cases in which the discretion of the judge must be exercised, frequently occur. When a party has closed his case, he often asks, and is allowed, to supply a deficiency.

Supposing, however, this was not a matter in the discretion of the judge, I do not think that the evidence should have been excluded. The defendant introduced a mark by which he sought to identify the chaff. Even supposing that the plaintiff had reason to suspect that such evidence might be given, I do not think that she would be bound to waste time by answering by anticipation that which might never be set up.

ledging that the estate *passed* by the devise in the first will,—in other words, that the admission was insufficient, because the defendants did not thereby acknowledge that the latter will under which they claimed, was void, *and the plaintiff entitled to*

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CRESSWELL, J. If the question had been, whether the judge was bound to receive or bound to reject the evidence, I should have said that he was bound to receive it. When the witnesses for the plaintiff were examined, there was nothing to call their attention to the fact of linseed being mixed with the chaff.

But, however that may be, it was clearly a matter for the exercise of the discretion of the judge. The case is analogous to the practice at nisi prius, of allowing a question to be put on re-examination which does not arise out of the cross-examination.

TALFOURD, J. I think that this was a matter for the discretion of the judge, and I also think that such discretion was soundly exercised. In my opinion, no injustice has been done; and I see no ground for disturbing the verdict.

Rule discharged. (*a*)

a verdict. Upon the second trial the plaintiff, having the advantage of the opening and the reply, obtained a verdict from a special jury of the county in which the lessor of the plaintiff was a magistrate. The defendants, impoverished and disheartened did not renew the contest, and their ancestral lands were irretrievably aliened to another family, by an instrument revocable, and found to have been actually revoked,—so found by the only jury to whom the question appears to have been either legally or fairly submitted.

(*a*) In this case the cause of the defendant's failure seems to have been, his taking the *benefit* of the statute of *Anne.* If he had confined his defence to the third plea, or even if he had been contented to plead that plea with the addition of the general issue only, the evidence in reply would have been clearly inadmissible. It was not attempted to be shewn that the defendant *knew,* or had the means of knowing, that the father had sent to his daughters linseed mixed with chaff. This fact therefore could not in the least degree lessen or affect the probability of the plaintiff's felony, as presented to the mind of the defendant. In the result the defendant appears to have lost his verdict upon the third issue by the effect of evidence admissible only on the second. This is one of the numerous incongruities introduced by relaxing the law as to double pleading, and at the same time retaining those rules as to pleading and *evidence* which were framed with reference to an absolute singleness of issue.

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The QUEEN *v.* The SHERIFF of LEICESTERSHIRE, in the Cause of ARDEN *v.* BINGHAM.

The amount of fine to be imposed on the sheriff for the negligent escape of an execution debtor, will be measured by the amount of injury likely result to the execution creditor.

In a case where the amount of injury sustained was doubtful, the Court directed an application to stay proceedings on an attachment against the sheriff for the escape, to stand over, with liberty to the execution creditor to bring an action for the sole purpose of ascertaining the amount of damage sustained.

ARDEN having obtained a judgment in this Court against *Bingham*, issued a *capias ad satisfaciendum* into the County of *Leicester* for 2600*l.* The sheriff, being ruled, returned *cepi corpus*, and that the defendant, against his will, escaped out of his custody, and that he had not since been able to retake him.

In *Hilary* Term last, a rule was obtained by *Lush*, calling upon the sheriff to show cause why this return should not be quashed, and why an attachment should not issue.

In the same term, cause was shown against this rule by *Hugh Hill* and *J. B. Karslake*, upon an affidavit denying collusion on the part of the sheriff with the judgment debtor. They contended that, since the 5 & 6 *Vict. c.* 98.,— which, by sect. 31., takes away the action of debt given by *Westm.* 2. & 1 *Rich.* 2. *c.* 12., —the remedy for an escape upon final process is an action on the case founded upon the late statute.

Lush, in support of the rule. The return being clearly bad, the Court is bound to quash it. No return then remaining on the files of the Court, the sheriff is in contempt for not obeying the rule of Court, by which he was required to return the writ.

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An attachment for this contempt follows as a matter of course.

Per Curiam. The rule must be made absolute for quashing the return and issuing an attachment: the attachment to lie in the office during the first six days of *Easter* Term.

In *Easter* Term, *Channell*, Serjt., obtained a rule calling upon *Arden* to shew cause why proceedings should not be stayed on the rule and on the attachment, upon payment by the late sheriff (from whose custody *Bingham* had escaped, and who had made the insufficient return) of such sum, or upon the performance of such terms, as the Court should direct, or why it should not be referred to the Master, to ascertain what damage, if any, *Arden* had sustained by reason of the escape.

Byles, Serjt., and *Karslake* now shewed cause. The return is clearly insufficient. The Court has already, in effect, decided that it is no return; and they will not relieve the sheriff from the position in which he has chosen to place himself, upon any terms less beneficial to the judgment creditor than the payment of the sum for which the judgment stands, and for which the execution issued, the attachment coming in lieu of the action of debt. *Heppel* v. *King*. (*a*)

Channell, Serjt., and *Hugh Hill*, *contrà*. The 5 & 6 *Vict. c.* 98. *s.* 31., places the remedy for escapes upon final process upon the same footing as that for escapes upon mesne process. In either case the sheriff is now

(*a*) 7 *T. R.* 370., and see *Hawkins* v. *Plomer*, 2 *W. Bla.* 1048; *Fowlds* v. *Mackintosh*, 1 *H. Bla.* 233; *Stevenson* v. *Cameron*, 8 *T. R.* 28; 2 *Wms. Saund*, 61.

to be liable only to the extent of the damage actually sustained; and it would be unreasonable to fix the sheriff with an amount of damages exceeding those which plaintiff could have recovered by action, and more than what he has actually sustained.

WILDE, C. J. The fine to be imposed on the sheriff, for his contempt in not obeying the process of the Court, ought to be such as will place the execution creditor as nearly as possible in the same position in which he would have stood if the sheriff had performed his duty in accordance with the late statute, which limits the remedy of the execution creditor against the sheriff to the damage actually sustained. As the materials before the Court do not furnish us with the means of ascertaining the amount of the damage incurred, the rule should be enlarged, for the purpose of enabling the judgment creditor to bring an action against the sheriff, in which the only question to be raised will be the amount of damage sustained.

Rule accordingly. (*a*)

(*a*) And see *Evans* v. *Manero* or *Maners*, 7 *M. & W.* 463, 9 *Dowl. P. C.* 256.

The BANK of AUSTRALASIA *v.* HARDING.

The members, resident in *England*, of a company formed for the purpose of carrying on business in a place out of *England*, are bound, in respect of the transactions of that company, by the law of the country in which the business is carried on accordingly.

A statute authorising an unincorporated company to sue and to be sued in the name of its chairman, constitutes the chairman, when so suing or so sued, an agent for the members of the company in the affairs of the company.

The members of a company formed for the purpose of carrying on business

ASSUMPSIT. The first count of the declaration stated, that whereas, before and at the several times thereafter, in that count mentioned, several persons had formed themselves into a company, esta-

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blished at *Sydney*, in parts beyond the seas, to wit, in Her Majesty's Colony of *New South Wales*, under the name, style, and firm of the *Bank of Australia*, for the purpose of carrying on at *Sydney* aforesaid the trade and business of bankers (*a*), to wit, for the purposes of discount and issuing notes and bills, and lending moneys on securities and cash accounts; for the receiving of moneys on deposit account for the safe custody of moneys and securities for moneys for the general public accommodation and benefit; and also for transacting and negotiating all such other measures and things as were usually done and performed relating to or connected with the ordinary business of banking, and the said company were before and at the several times thereafter in that count mentioned, so carrying on at *Sydney* aforesaid the said trade and business of bankers: And whereas, after the said formation and establishment of the said company, and whilst the same was carrying on the said trade and business, and before the bringing of such action as is therein mentioned, to wit, on the 28th day of *August*, 1833, a certain Act of the Governor and Legislative Council of *New South Wales* was made and passed relating to and concerning the said company, to wit, an act, intituled "An Act to enable the proprietors of a certain banking

(*a*) Vide 6 *M. & G.* 671.

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in a colony, are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in *England*, not being served with process, and having received no notice of the proceedings.

Where a statute subjects the property of members for the time being of an unincorporated company, to execution upon a judgment obtained against their chairman, reserving in other respects the liabilities of parties, the remedies given against the property are in cumulation, and a member may be proceeded against by action.

A judgment in a colonial court is no estoppel; nor is it pleadable in bar in an action brought in *England* for the same cause.

establishment or company carried on in the town of *Sydney* in the colony of *New South Wales*, under the name, style, and firm of the Bank of *Australia*, to sue and be sued in the name of the chairman of the said bank or company for the time being, and for the purposes therein mentioned," which act was and is in the words and of the tenor following, that is to say: "Whereas several persons formed themselves in a company or society established at *Sydney*, under the name, style, or firm of the Bank of *Australia*, as well for the purposes of discount and issuing of notes and bills, and lending moneys on securities and cash accounts; for the receiving of moneys on deposit accounts; for the safe custody of moneys and securities for moneys for the general public accommodation and benefit; and also for transacting and negotiating all such other matters and things as are usually done and performed relating to or connected with the ordinary business of banking: And whereas the said bank is now carried on in *Sydney*, and is under the care and management and superintendence of eleven directors, one of whom is chairman of the said Bank: And whereas difficulties may arise in recovering debts due to the said bank or company, and in maintaining actions or proceedings for damages done to their property, and also in prosecuting persons who may steal or embezzle the bills, notes, bonds, mortgages, moneys, goods, chattels, or effects of the said bank: And whereas it would be convenient and just that persons having demands against the said bank should be entitled to sue some member thereof in place and stead of the whole: But as these purposes cannot be effected without the aid and authority of the Legislature, Be it therefore enacted, by his Excellency the Governor of *New South Wales*, with the advice of the Legislative Council, that from and after the passing of this act, all actions and suits and all proceedings at law or in equity, to be com-

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menced and instituted, and prosecuted or carried on by or on behalf of the said bank; or when the said bank is or shall be in any way concerned, against any person or persons, body or bodies politic or corporate, or whether a member or members of the said bank, or otherwise, shall and may be lawfully commenced, instituted, and prosecuted or carried on in the name of the person who shall be chairman of the said bank at the time any such action, suit, or proceeding shall be commenced or instituted as the nominal plaintiff, complainant, or petitioner for and on behalf of the said bank, and that all actions, suits, or proceedings aforesaid to be commenced, instituted, or prosecuted against the said bank, shall be commenced, &c., against the chairman for the time being of the said bank, as the nominal defendant for and on behalf of the said bank, and that all prosecutions to be brought, instituted, or carried on, by or on behalf of the said bank for fraud upon or against the said bank, or for embezzlement, robbery, or stealing the bills, notes, bonds, moneys, goods, chattels, effects or property of the said bank, or for any other offence against the said bank, shall or may be so brought or instituted and carried on in the name of such chairman for the time being of the said bank; and in all indictments and informations it shall be lawful to state the property of the said bank to be the property of such chairman for the time being of such bank; and any offence committed with intent to injure or defraud the said bank shall and lawfully may, in any prosecution for the same, be stated or laid to have been committed with intent to injure or defraud such chairman for the time being of such bank; and any offender or offenders may thereupon be lawfully convicted of any such offence; and in all other allegations or indictments, informations or other proceedings, it shall and may be lawful and sufficient from and after the passing of this

act to state the name of such chairman; and the death, resignation, or removal, or other act of such chairman, shall not abate any such action, suit, or prosecution, but the same may be continued where it left off, and be prosecuted and carried on in the name of any person who may be or become chairman of the said bank for the time being.

And (*a*) that a memorial of the name of the chairman of the said bank, in the form or to the effect for that purpose set forth in the schedule hereunto annexed, signed by the said chairman and by a majority of the directors of the said bank, shall be recorded upon oath in the Supreme Court of *New South Wales* within thirty days after the passing of this act; and when and as often as any director of the said bank shall be newly elected chairman thereof, a memorial of the name of such newly-elected chairman, in the same form or to the same effect as the above-mentioned memorial, signed by such newly-elected chairman and a majority of persons who shall be directors of the said bank at the time of the election of such new chairman, shall in like manner be recorded upon oath in the said Supreme Court within thirty days next after such chairman shall be elected.

Provided always (*b*), and be it further enacted, that until such memorial as hereinbefore first mentioned, be recorded in the manner herein directed, no action, suit, or other proceeding shall be brought by the said bank in the name of the chairman of the said bank as aforesaid, under the authority of this act."

"Provided always (*c*), that the chairman being the plaintiff, complainant, petitioner, or defendant in any such action, suit, petition, or other proceeding as aforesaid, on behalf of the said bank, shall not prevent or

(*a*) Sect. 2. (*b*) Sect. 3. (*c*) Sect. 4.

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affect the competency of any such chairman so as to prevent him from being a witness in such action, &c., in the same manner as might have been if his name had not been made use of as such plaintiff, &c.

"*Provided always* (*a*), *that execution upon any decree or judgment in any such action, suit, &c., obtained against the chairman for the time being of the said bank, whether he be plaintiff or defendant therein, may be issued against, and levied upon, the goods and chattels, lands, and tenements of any member or members whatsoever of the said bank for the time being, in like manner and not otherwise than as if such decree or judgment had been obtained against such member or members personally.* Provided always, that every such chairman in whose name every such action, &c., shall be commenced, prosecuted, carried on, or defended, and every such member or members against whose goods and chattels, lands and tenements, execution upon any judgment or decree shall be issued or levied as aforesaid, shall always be reimbursed and paid out of the funds of the said bank, all such damages, dues, expenses, costs, and charges as by the event of any such proceeding such chairman or member or members shall or may be put unto or become chargeable with; and all such remedies shall be allowed as between the several members of the said bank for the time being, as if this act had not been passed.

And (*b*) that the provisions in this act contained shall extend and be construed, deemed, and taken to extend to the said bank, at all times during the continuance of the same, whether the said bank be now or hereafter composed of some, all, or any of the persons who were the original or are the present members thereof, or of all or some of those persons; together

(*a*) Sect. 5. (*b*) Sect. 6.

with some other person or persons, or shall be composed altogether of persons who were not originally nor are the members of the same.

Provided always (*a*), that nothing herein contained shall extend or be deemed, &c., to extend to incorporate the members of or proprietors of the said bank, or to relieve or discharge them or any of them from any responsibility, duties, contracts, or obligations whatsoever which by law they now are, or at any time hereafter shall be, subject or liable to either between the said bank and others, or between the individual members of the said bank, or any of them and others, or among themselves, or in any other manner whatsoever, except so far as the same are affected by the provisions of this act, and the true intent and meaning of the same.

And (*b*) that all bonds, mortgages, warrants of attorney, and other securities not being assignable in the law, which have been, or which shall or may at any time hereafter be, taken in the name of any person as chairman of the said bank for and on account of the said bank, shall and may be put in suit and be sued upon at law or in equity, in the name of the chairman in whose name the same may have been taken, or in the name of any person who shall or may succeed to that office, and be the chairman of the said bank at the time such proceeding or proceedings shall be instituted, notwithstanding the name of any such succeeding chairman be not inserted in such bond, &c. as an obligee, &c. of the sum or sums of money therein mentioned, and the death, resignation, removal, or other act of any such chairman of the said bank for the time being in whose name any such bond, &c. shall so be put in suit, shall not abate any action, &c. had thereon;

(*a*) Sect. 7. (*b*) Sect. 8.

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but the same may be continued where it left off, and be prosecuted and carried on in the name of any person who may succeed to that office, and be or become the chairman of the said bank for the time being; and the legal estate in all lands and tenements belonging or mortgaged to the said bank and all legal rights and capacities, shall become vested in such new chairman as aforesaid to all intents and purposes, immediately upon the recording of the memorial of the name of such new chairman in the said Supreme Court, and so on *toties quoties* whensoever any new appointment or election of a chairman for the time being of the said bank shall take place, and such new memorial thereof shall be inrolled as aforesaid.

And (*a*) that in any action to be brought by any chairman of, &c. by virtue of this act, the plaintiff therein shall not be nonsuit, nor shall a verdict be given against the plaintiff, for want of proof of the record of such memorial or memorials as hereinbefore mentioned; but in case the defendant in any such action shall make it appear on such trial that no such memorial or memorials have been recorded, then a nonsuit shall be entered in such action.

Provided always (*b*) that nothing in this act contained shall be deemed to affect, or apply to, any right, title, or interest of His Majesty, His heirs, and successors, or of any body or bodies politic or corporate, or of any other person or persons excepting such as are mentioned therein, or of those claiming by or under him or them.

And (*c*) that this act shall not commence or take effect until the same shall have received the royal approbation, and the notification of such approbation shall have been made by his Excellency the Governor in the *New South Wales Government Gazette.*

(*a*) Sect. 9. (*b*) Sect. 10. (*c*) Sect. 11.

And (*a*) that when and as soon as this act shall have received the royal approbation, and notification of such approbation shall have been made as aforesaid by his Excellency the Governor, in the *New South Wales Government Gazette*, this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by the Judges of the Supreme Court of *New South Wales*, and by all other judges, justices, and others, within the colony of *New South Wales* and its dependencies, without being specially pleaded.

Averment: That afterwards, and before the bringing of such action as hereinafter mentioned, to wit, on the 28th day of *August*, 1833, the said act received the royal approbation, and that the notification of such approbation was then made by the then Governor of *New South Wales* in the *New South Wales Government Gazette;* and that thereupon the said act then became, and was, and from thence continually had been, and still was, the law of and in the said colony applicable to the said company, and part and parcel of the law of the said colony; and that after the said act had become, and whilst the same was such law and parcel of the law of the said colony as aforesaid, and before and at the respective times of the bringing of such action and of the recovery of such judgment as thereinafter respectively mentioned, one *Thomas Chaplin Breillat* was the chairman of the said company, and the defendant before and at the respective times last aforesaid, and also before and at the times of the making of such promises by the said company, as thereafter in that count mentioned, was and from thence respectively, had been, and still was, a member of the said company; and that whilst the said *Thomas Chaplin Breillat* was the chairman of the said company as aforesaid, and whilst the defendant was a member of the said company as aforesaid, to wit, on

(*a*) Sect. 12.

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the 7th day of *December*, A.D. 1844, they the plaintiffs caused the said *Thomas Chaplin Breillat*, as such chairman of the said company, to be summoned, according to the course and practice of the *Supreme Court of New South Wales*, to appear as the nominal defendant for and on behalf of the said company, in the said Court, pursuant to the provisions of the said act, to answer the plaintiffs in an action on promises; and that afterwards, to wit, on the day and year last aforesaid, the said *Thomas Chaplin Breillat* having duly appeared in the said court, according to the course and practice of the said court, to such summons, the plaintiffs did thereupon then declare in the said action against the said *Thomas Chaplin Breillat*, as the chairman of the said company, and as the nominal defendant for and on the behalf of the said company, by virtue of the said act; and that such proceedings were thereupon further had in the said Supreme Court of *New South Wales*, in the said action, that afterwards, and whilst the said *Thomas Chaplin Breillat* continued to be and was the chairman of the said company, and whilst the defendant continued to be and was a member of the said company, to wit, on the 8th day of *September*, A. D. 1845, the plaintiffs, by the consideration and judgment of the said Supreme Court, recovered against the said *Thomas Chaplin Breillat*, as the chairman of the said company, as aforesaid, as well a certain sum of 175,703*l.* 18*s.* 7*d.*, for the damages which the plaintiffs had sustained by and on account of the non-performance of certain promises before that time made by the said company to the plaintiffs, as also the sum of 2404*l.* 2*s.* 0*d.* for their costs and charges by the same court then adjudged to the plaintiffs, with their assent; which damages, costs, and charges in the whole amount to 178,108*l.* 0*s.* 7*d.*; whereof the said *Thomas Chaplin Breillat*, as the chairman of the said

ompany, and as such nominal defendant as aforesaid, ras convicted; and that the said promises were made, nd the said plaintiffs' causes of action in respect thereof rose within the jurisdiction of the same court, and hat the same court, during all the time whilst the aid action was pending therein as aforesaid, and continually until and at the time of the giving of the said udgment, was, and was duly holden, within the jurisiction thereof, in parts beyond the sea, to wit, at *Sydney* aforesaid, and that the said judgment was given y the said Supreme Court at a place within the jurisdicion of the same court, to wit, at *Sydney* aforesaid, to wit, y the Chief Justice and other the Justices of the said Supreme Court, to wit, by *Alfred Stephen*, Esq., Chief Justice, and *John Nodes Dickinson*, Esq., and *William A'Beckett*, Esq., Justices of the same court. And further hat the said judgment still remains in full force and ffect, and not in any wise satisfied, reversed, or annulled; and that no execution hath as yet been obtained f, or upon the said judgment; and that the damages, osts, and charges aforesaid, in form aforesaid adjudged o the plaintiffs, are of great value—to wit, of the value of 178,108*l.* 0*s.* 7*d.* By means of which several premises the defendant as and being such member of he said company as aforesaid, then became, as such nember of the said company, liable to pay to the plaintiffs the last-mentioned sum of money, when he, the defendant, should be thereunto afterwards requested; and, being so liable, and the last-mentioned sum of money then being and remaining wholly due and unpaid, he, the defendant, then—to wit, on the day and year last aforesaid—in consideration of the premises, promised the plaintiffs to pay them the last-mentioned sum of money upon request. Breach, in non-payment.

The second count stated, that whereas before the

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30th day of *October*, 1843, in parts beyond the sea, to wit, at *Sydney*, in Her Majesty's colony of *New South Wales*, the defendant made his promissory note in writing, bearing date the day and year last aforesaid, and thereby promised to pay the plaintiffs, on demand, 154,000*l*, with interest for the same, to wit, interest at the rate of 8 per cent. per annum from the date thereof, such rate of interest then being the usual and customary rate of interest in that behalf, and the highest legal rate of interest, in the said colony; and then delivered the same to the plaintiff. Breach, in non-payment.

The declaration also contained a count for money lent, and a count upon an account stated.

Fourth plea — to the first count of the declaration — That the defendant was not a native of the said colony, or born at any place within the jurisdiction of the said Supreme Court, but, on the contrary thereof, was born out of the said colony, and out of the jurisdiction of the said Supreme Court, to wit, in *England;* and that the defendant was not before or at the respective times of the bringing of the said action, and the recovery of the said judgment, as in the first count mentioned, or at any time since, resident or domiciled in the said colony, or at any place within the jurisdiction of the said Supreme Court, and was not, in any manner, during the time last aforesaid, or any part thereof, bound by, or subject to the laws of the said colony; and that, although the said judgment was in fact recovered by the plaintiffs in the said Supreme Court as in the said first count of this declaration mentioned, he, the defendant, was not at any time summoned by any summons, or served with any process, issuing out of the said Supreme Court, at the suit of the plaintiffs for the causes of action upon which the said judgment was so recovered; nor had he, the defendant, any notice, or knowledge of any such summons,

or process, or of the proceedings in the said action; nor did he, the defendant, appear, nor had he any opportunity of appearing, in the said court to answer the plaintiffs in the said action. Verification.

Tenth plea,—to the second, third, and fourth counts —That the plaintiffs ought not to be admitted or received to say that the defendant promised as in those counts, or any of them, alleged; because he says that the several promises in those counts respectively mentioned, were made by the defendant as a member of the bank or company in the said first count mentioned, and that the plaintiffs' said several causes of action in respect of the said several premises respectively, accrued to the plaintiffs from the defendant as such member of the said bank or company as aforesaid, and not otherwise; and that before and at the respective times of the making of the several last-mentioned promises by the defendant as such member of the said bank or company as aforesaid, and of the bringing of such action and the recovering of such judgment as hereinafter respectively mentioned, the said bank or company was established and carried on in parts beyond the seas, to wit, at *Sydney*, in Her Majesty's colony of *New South Wales*, under and by virtue of the act in the said first count mentioned, which act, before and at the several times of the making of the last-mentioned promises by the defendant as such member of the said bank or company as last aforesaid, and of the bringing of such action and the recovering of such judgment as hereinafter respectively mentioned, was, and from thence respectively had been, and still was, part and parcel of the law of the said colony, applicable to the said bank or company; and that, before and at the respective times of the making of the respective promises by the defendant as such member of the said bank or company as last aforesaid, and of the bringing of such action and the recovering of

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such judgment as hereinafter respectively mentioned, by the law of the colony, a judgment recovered in the Supreme Court of the said colony by any person or persons, or any body or bodies politic or corporate, having any demands upon the said bank or company, against the chairman of the said bank or company for the time being, as the nominal defendant for and on behalf of the said bank or company, pursuant to the provisions of the said act, from thence respectively had been, and still was, an absolute and fixed bar and preclusion to and against any other action or suit for the same demand against any individual member of the said bank or company: and that, after the making of the said last-mentioned promise as aforesaid by the defendant as such member as aforesaid, and before and at the respective times of the bringing of such action and the recovery of the said judgment as hereinafter respectively mentioned, one *Thomas Chaplin Breillat* was the chairman of the said bank or company liable to be sued as the nominal defendant for and on behalf of the said bank or company by virtue of the said act; and that, after the making of the several last-mentioned promises by the defendant as such member of the said bank or company as aforesaid, and before the commencement of this suit,—to wit, on the 7th day of *September*, 1844,—the plaintiffs caused the said *Thomas Chaplin Breillat*, as such chairman of the said bank or company as aforesaid, to be summoned according to the course and practice of the Supreme Court of *New South Wales*, to appear as the nominal defendant for and on behalf of the said bank or company in the said court, pursuant to the provisions of the said act, to answer the plaintiffs in an action on promises; and that afterwards, to wit, on the day and year last aforesaid, the said *Thomas Chaplin Breillat*, having duly appeared in the said court, according to the course and practice of the said

court, to the summons, the plaintiffs did thereupon then declare against the said *Thomas Chaplin Breillat* as the chairman of the said bank or company, and as the nominal defendant for and on behalf of the said bank or company by virtue of the said act: and that such proceedings were thereupon further had in the said Supreme Court in the said action, that afterwards, and whilst the said *Thomas Chaplin Breillat* continued to be, and was, chairman of the said bank or company, and before the commencement of this suit, to wit, on the 8th *September*, 1845, the plaintiffs, by the consideration and judgment of the said Supreme Court, recovered against the said *Thomas Chaplin Breillat* as such chairman of the said bank or company as aforesaid, as well a certain sum of 175,703*l.* 18*s.* 7*d.*, for the damages which the plaintiffs had sustained on occasion of the non-performance of certain promises before that time made by the said bank or company to the plaintiffs, as also the sum of 2404*l.* 2*s.* 0*d.* for their costs and charges by the said Supreme Court then adjudged to the plaintiffs with their assent; which damages, costs, and charges in the whole amount to 178,108*l.* 0*s.* 7*d.*; whereof the said *Thomas Chaplin Breillat*, as such nominal defendant as aforesaid, was convicted; as by the proceedings of the court, reference being thereunto had, will amongst other things more fully and at large appear; and that the last-mentioned promises were made, and the plaintiffs' causes of action in respect thereof arose, within the jurisdiction of the said Supreme Court of *New South Wales;* and that the said court, during all the time whilst the said action was depending therein as aforesaid, and continually until and at the time of the giving of the said judgment, was duly holden within the jurisdiction thereof, in parts beyond the seas, to wit, at *Sydney*, in the said colony of *New South Wales;* and that the said judgment was given by the said court at a place

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within the jurisdiction of the said court, to wit, at *Sydney* aforesaid, to wit, by the Chief Justice, and other the Justices, &c. of the court, to wit, &c., by, &c.; which judgment still remains, and is in full force and effect, and not in any wise reversed, vacated, or made void; and that the several promises and causes of action in the said second, third, and last counts of this action respectively mentioned, are the same identical promises and causes of action for, upon, and in respect of which the plaintiffs brought the said action and recovered the said judgment in the said Supreme Court of *New South Wales*, against the said *Thomas Chaplin Breillat*, as the chairman of the said bank or company, and as such nominal defendant as aforesaid; and that, by the law of the colony, the judgment so recovered against the said *Thomas Chaplin Breillat*, as the chairman of the said bank or company, and as such nominal defendant for and on behalf of the said bank or company, as in that plea is mentioned, was final and conclusive in the said colony against the said *Thomas Chaplin Breillat* as such nominal defendant as aforesaid, and was an absolute and final bar and preclusion to and against any action or suit against the defendant as a member of the said bank or company, for or in respect of the said promises and causes of action in the said second, third, and last counts respectively mentioned, or any of them. Verification: wherefore the defendant prays judgment, if the plaintiffs ought to be admitted or received, against the judgment so recovered by them as aforesaid, to say that the defendant promised as in the said second, third, and last counts, or in any of them, is alleged.

Upon the fourth plea, the issue taken was, that the defendant was at the several times of the bringing of the said action and of the recovery of the said judgment, bound by, and subject to, the laws of the said

colony, to wit, as and being at the several times last aforesaid a member of the said bank or company.

To the tenth plea the plaintiffs demurred, shewing for cause of demurrer, that the said plea does not allege or disclose any matter of estoppel, and ought not to be pleaded by way of estoppel, and is improperly commenced and concluded as a plea of estoppel, and has not a proper formal commencement or conclusion, and does not pray a proper judgment; and also for that the said last plea is ambiguous, and has a double aspect, in this, to wit, that it proposes to shew that the said causes of action are merged in the judgment in that plea mentioned, and also assumes to set up such judgment as an estoppel to the plaintiff's recovery in respect of the promise as to which the said plea is pleaded; and also for that the said plea ought to have been pleaded as an ordinary plea in bar, inasmuch as the supposed defence therein contained, purposes to be, that the causes of action as to which the said plea is pleaded, were merged in the said judgment; and for that it does not appear how or why the said judgment should be an absolute and final bar and preclusion to and against any action or suit by the plaintiffs against the defendant, as a member of the said bank; and that if the said plea discloses any matter of defence at all, such matter of defence is improperly pleaded, and has not the legal operation and effect attempted to be given to it by the said plea; and for that the said plea is inconsistent and repugnant, inasmuch as it avers that the plaintiffs ought not to be admitted or received to say that the defendant promised as in the said second, third, and last counts or any of them mentioned, whilst the said plea in the body of it conclusively shews that the defendant, as a member of the said Bank of *Australia*, did so promise, and that judgment was recovered upon

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and in respect of such promises of the defendant, and the non-performance thereof. (*a*)

Channell, Serjt. (with whom were *Gaselee*, Serjt., *Hugh Hill*, and *Welch*) for the plaintiffs. As the defendant has stated that he means to object to the declaration, it will be convenient to begin with the first count, to which the objection applies. That count sets out a judgment recovered in the Supreme Court of *New South Wales* against a party sued as nominal defendant on behalf of the bank of which he was chairman. Of

(*a*) In 1845, the Bank of *Australia*, then being in pecuniary difficulties, applied to the Bank of *Australasia* for assistance. Upon the negotiation of the loan, an agreement was entered into by the directors of the Bank of *Australia* with the Bank of *Australasia*, which contained stipulations, some of which the directors of the Bank of *Australia* had no authority to enter into. Various sums were advanced by the Bank of *Australasia* to the Bank of *Australia* in pursuance of the agreement, and, on the 30th of *October*, 1843, a balance of 154,000*l.* was struck. For this amount and interest a promissory note was signed by the chairman of the Bank of *Australia*, pursuant to a resolution of the directors, "for value received, for and on behalf of the Bank of *Australia*." The shareholders of the Bank of *Australia* denied the liability of the bank to pay this note, on the ground that the directors had exceeded their powers. An action was brought on this note against *Breillat*, the then chairman of the Bank of *Australia*, in the Supreme Court of *New South Wales*, in which action a verdict was found for the defendant, under the direction of *Dickenson* and *A'Beckett*, JJ., against the opinion of *Alfred Stephen*, C. J. Upon appeal against the judgment pronounced upon this verdict, it was held by the Privy Council that the directors of the Bank of *Australia* had the power of managing partners in an ordinary banking partnership, and that amongst such powers was the power of borrowing money for the purpose of discharging the existing liabilities of the bank until the assets should be realised, and that the circumstance of the agreement for the loan being accompanied with stipulations, some of which were *ultra vires*, did not discharge the Bank of *Australia* from liability to repay the loan. *Bank of Australasia* v. *Breillat*, Chairman of the Bank of *Australia* (upon an appeal from the colonial judgment), 8 *Moore*, *Privy Council Cases*, 152.

that bank the defendant was a member as well at the time when the cause of action arose, as also when the action was brought, and when the judgment was recovered in the colonial court. The present action is therefore free from the various difficulties which might have arisen if, at one of those periods, the defendant had not been, or had ceased to be, a member of the bank. The judgment in reality is a judgment against "the defendant and others." A judgment in a foreign or in a colonial court, though certainly not conclusive, is *primâ facie* to be considered to be good. The onus of impeaching it lies on the defendant. It will perhaps be contended, that in the colony the defendant could not have been sued as a member of the bank, and that the plaintiffs would have been bound to have recourse to the provisions of the colonial act; and, it may be urged, that, if the defendant could not have been sued individually in the colony, he cannot be sued individually here. It will also probably be said, that the defendant is only liable to be proceeded against under the provisions of the colonial act, and that his sole liability is, to execution in *New South Wales*. The first objection proceeds on the assumption that the provisions of the colonial act tally with those of the British Joint Stock Bank Act (*a*); and cases will be referred to in which it has been held, that, under the English act, the remedy of a creditor is against the public officer of the company, and not against individual members. But in this respect there is a material difference between the provisions of the two acts. Now, the case of *Steward* v. *Greaves* (*b*) was decided expressly upon the 10th section of the Joint Stock Bank Act, by which act the Bank of England waived its exclusive privilege upon a specific condition. That section provides "that it shall be lawful for the plaintiff to cause

(*a*) 7 *G.* 4. *c.* 46. (*b*) 10 *M.* & *W.* 711.

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execution upon any judgment, decree, or order obtained by him in any such action or suit, to be issued against the property and effects of the company; and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution in satisfaction of such judgment against the person, property, and effects of any shareholder; or, in default of obtaining satisfaction of such judgment, &c., from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose: Provided always, that no person having ceased to be a shareholder of the company shall be liable for the payment of any debt for which any such judgment, &c., shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same, or for which judgment shall have been obtained after the expiration of three years from the time when he shall have ceased to be a shareholder of such company; nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this act had not been passed."

These were the provisions relied upon by *Parke* B. in the judgment delivered by him in *Chapman* v. *Milvain.* (*a*) But the colonial act contains no such provisions. In *Chapman* v. *Milvain* it was held that the public officer must be made the plaintiff. But, in *Blewitt* v. *Gordon* (*b*), it was held that the words "*shall and lawfully may* sue the public officer as the nominal

(*a*) 14 *Jurist*, 251., since reported 19 *Law Journ.* Exch. 228, 5 *Exch.* 61.

(*b*) 1 *Dowl.* N. S., 815. And see *Beech* v. *Eyre*, 5 *M.* & *G.* 421., 6 *Scott*, *N. R.* 327.

defendant," did not deprive the plaintiffs of their common-law right of suing members of the company. That case has never been overruled. The 7th section (*a*) of the colonial act expressly reserves the ordinary liabilities of the shareholders. Looking at this act, it is evident that it was intended to give to the creditors of the bank a cumulative remedy. The powers given by the 7th section of the colonial act are not to be found in the English Bank Act. [*Maule* J. Does not the question come upon the exception?] This is not a judgment against the defendant solely. The Supreme Court of *New South Wales* has no jurisdiction beyond the limits of the colony. If the creditor can enforce his judgment only by execution, he is without remedy against a shareholder who neither resides in the colony nor has property there. It is submitted, that, even in the colony, a creditor is not *bound* to sue the officer of the bank, but may bring his action against any member with respect to whom it can be shewn that he was a contracting party. Here, the defendant, by pleading to the action, admits that he is within the jurisdiction of the court in which he is impleaded. The reason why a party is allowed to sue here on a foreign judgment, is, that such judgment is evidence of a debt, and the onus of impeaching it lies on the other side; *Mason* v. *Nicholls* (*b*), which is since the 7 & 8 Vict. c. 96 (*c*); *Hanmer* v. *White*.(*d*)

(*a*) *Suprà*, 667.

(*b*) 14 *M. & W.* 118.

(*c*) The 9th section of this statute is similar to the 9th section of 7 *Geo.* 4. *c.* 46, (*antè*, p. 680.), with this additional article, "And also, subject to the provisions hereinafter contained, upon the profits and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceedings; and that it shall be lawful for the plaintiff to cause execution upon any judgment obtained by him in any such action or suit against the company, to be issued against the property and effects of the company."

(*d*) 12 *M. & W.* 519.

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Upon the demurrer to the fourth plea, the question is, whether, assuming the declaration to be good, that plea affords a sufficient answer. To what extent does the plea establish the non-residence within the colony? It excludes the defendant's being resident at the time the action against *Breillat* was brought on which the judgment was given. Consistently with this allegation the defendant may have been resident in the colony until shortly before the bringing of that action. (*a*) It is submitted that the plea should have negatived the residence in the colony at any time before action brought. At all events, it should have stated that the defendant had no property within the colony. The plea alleges that the defendant had not at any time notice or knowledge of the summons, the process, or the proceedings. This allegation must be understood as merely denying actual notice or knowledge; whereas, supposing notice to be necessary, notice to an agent, although it should never have been communicated to the defendant, would have been sufficient; *Vallée* v. *Dumergeon.* (*b*) So, notice left at the last known place of abode within the colony might, for anything which appears here, be sufficient; *Becquet and Others* v. *MacCarthy* (*c*); *Cowan* v. *Broadwood* (*d*); *Reynolds* v. *Fenton.*(*e*)

With respect to the replication to the fourth plea, it is a sufficient answer to the fourth plea, assuming that the fourth plea can be supported. It sets out foreign law, which is to be dealt with here as matter of fact.

(*a*) There appears to be an ambiguity about the words "or at any time *since*," which may mean either "since the bringing of the action, and since the recovery of the judgment," or since the latter period only; in which case the defendant might within the terms of the plea, have been resident within the colony from the commencement of the action to the recovery of the judgment, *exclusivè*.

(*b*) 18 *Law Journ.* N. S. (Exch.) 378., since reported 4 *Exch.* 290.

(*c*) 2 *B. & Ad.* 951.

(*d*) 1 *M. & G.*, 882., 2 *Scott, N. R.*, 128.

(*e*) 3 *C. B.* 187.

[*Maule* J. Whether the law of a foreign country is binding or not in a particular case, is matter of law here and elsewhere.]

The tenth plea is bad in form and in substance. The plea attempts to set up an estoppel, but it prays that the plaintiffs may be precluded from asserting what the defendant admits to be true, namely, that the defendant promised as alleged in the declaration. If the plea is to be regarded as a plea of judgment recovered, not only are the commencement and the conclusion informal, but the plea is bad in substance, as not shewing any merger of which our courts can take notice: *The General Steam Navigation Company* v. *Guillou* (*a*); *Smith* v. *Nicolls.* (*b*)

Willes, contrà. The first count of the declaration is bad. No foundation is laid for the promise which the defendant is alleged to have made, except the colonial judgment obtained under the provisions of the colonial act. Now, that act gives the judgment-creditor a remedy against the property of persons who were members of the bank for the time being, *i. e.* at the time of the award of execution, but nothing further. It is said that the colonial act gives a cumulative remedy; but no ground is shewn for that assertion. Supposing, however, the remedy to be so far cumulative that the plaintiffs might have either sued the defendant upon the original cause of action, or brought their action against the chairman, they have made their election. Professor *Story* says (*c*), "Suppose a contract by the law of our country to involve no personal obligation—as was supposed to be the law of *France* in a particular case which, came in judgment (*d*)—but merely to confer a

(*a*) 11 *M. & W.* 387.
(*b*) 5 *New Cases*, 208.
(*c*) *Conflict of Laws*, 267.
(*d*) *Melan* v. *Fitzjames*, 1 *B. & P.* 138; overruled in *Imlay* v. *Ellefson*, 2 *East*, 453.

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right to proceed *in rem*, such a contract would be held everywhere to involve no personal contract whatsoever." So, here, the right to sue the chairman being conferred by statute, the recoveror of a judgment against the chairman can enforce the judgment so obtained, only by the mode pointed out by the statute.

In the fourth plea the defendant insists that he is not responsible for the acts or defaults of an agent appointed, not by himself, but by the act of a legislature to which he was a stranger, and by whose acts he was not bound. It is contrary to natural justice to proceed against a party who is not within the jurisdiction of the court in which proceedings are commenced and carried on, and who has no notice of such proceedings: *Reynolds* v. *Fenton* (*a*); *Becquet* v. *MacCarthy* (*b*); *Buchanan* v. *Rucker* (*c*); *Ferguson* v. *Mason* (*d*); *Story's Conflict of Laws*, sect. 546, 547, &c.

The tenth plea is a good plea in bar in substance; and the supposed informality in the prayer of judgment is not material. The plea shews, that, by the colonial enactment, the judgment recovered against the chairman was final and conclusive. In *Smith* v. *Nicolls*(*e*), the plea was held bad for the want of such an allegation: *General Steam Navigation Company* v. *Guillou* (*g*); *Story's Conflict of Laws*, sect. 509, 510. 522. 603, 604, 605, &c.

Channell, Serjt., in reply. The cases upon the Bank Act do not apply. The colonial act, ss. 5. 7. (*suprà*, 666, 667), gives a right to reimbursement and contribution. By taking a share in the bank, the defendant constituted

455. And see *Pedder* v. *MacMaster*, 8 *T. R.* 609; *Mure* v. *Kaye*, 4 *Taunt.* 34. 40.; 3 *Mann. & R.* 40, n.

(*a*) *Antè*, Vol. III. 187.

(*b*) 2 *B. & Ad.* 951.

(*c*) 1 *Campb.* 63.

(*d*) 11 *A. & E.* 170.

(*e*) 5 *New Cases*, 208.

(*g*) 11 *M. & W.* 877.

the persons by whom the affairs of the bank were conducted, his agents in everything connected with the affairs of the bank.

The tenth plea admits the liability of the defendant upon the original contract; and, although a colonial judgment works a merger in the colony, it is otherwise in the courts of this country, where no foreign or colonial judgment is treated as matter of record: *Smith* v. *Nicolls; Robertson* v. *Sir William John Struth.* (*a*)

Wilde, C.J. It appears to me that the declaration is sufficient, and that both the fourth and the tenth pleas are bad.

The objection to the declaration is to the first count. That count states that the defendant was a member of a banking company acting under a colonial statute; a statute which may be assumed to have been obtained at the request of the parties. It provides, that one member holding a principal office in the company, may sue and be sued, instead of the whole body; and that execution may issue against the property of the other members of that body. But, while giving this benefit to the company, the act provides that it shall not vary the rights or the liabilities of the parties. Now, independently of the colonial act, the defendant would have been liable in respect of the demand for which the defendant is now sued; and, if the judgment had been recovered in an action brought against all the members jointly, an action of debt or assumpsit would clearly have lain against the defendant upon that judgment.

The first objection taken to the count is, that the remedy given by the colonial act upon the judgment, is not against the person of the shareholder, but is

(*a*) 5 *Q.B.* 941.

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limited to execution against the goods of those who are partners at the time the execution issues. I think this is not so; but that the effect of the colonial act is to extend the effect of the judgment. The first count of the declaration shews, that, under the colonial act, all previous rights and liabilities of the parties were reserved. These are sufficient to bind the defendant.

The fourth plea states that the defendant had not at any time notice or knowledge of any summons or process, or of the proceedings in the action in the colonial court. Suppose he had no notice. The first count declares that the defendant was dealing with the public upon the terms of the colonial act, and that he assented to the chairman's being considered, for all purposes connected with the suit, as his representative. For these reasons I think the fourth plea bad, and that it therefore becomes unnecessary to consider the objections which have been raised to the replication to that plea.

The tenth plea denies the right of the plaintiffs to sue upon the original causes of action, on the ground that these causes of action were merged in the judgment obtained against the chairman. Where a security of a higher nature is taken for a demand of a lower nature, the latter is merged in the former; and therefore, in the colony of *New South Wales*, where the judgment recovered against the chairman, is a security of a higher nature than the debt upon which it was founded, a merger no doubt took place. This merger was, however, confined to the district in which the judgment recovered, being there conclusive, was a security of a higher nature than the debt upon which it was founded. But in *England* the colonial judgment, which stands upon the same footing as a foreign judgment, is not a security of a higher nature than the prior simple con-

tract debt. (*a*) The principle of merger, therefore, does not apply. Any doubt upon that subject is removed by the case of *Houlditch* v. *The Marquess of Donegal* (*b*), in which the House of Lords decided that a foreign judgment is not conclusive, but is merely *primâ facie* evidence, reversing a contrary decision in the court of Chancery in Ireland.

I think, therefore, that the plaintiffs are entitled to judgment.

Maule, J. During part of the argument I was not present; and, as the rest of the court are clear that the plaintiffs are entitled to judgment on the whole record, I shall not depart from them. With respect to the sufficiency of the first count and the badness of the fourth plea, I fully concur with what has fallen from the Lord Chief Justice. With respect to the tenth plea, I am not so clear.

Cresswell, J. I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to have been a consenting party to the passing of the colonial act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the company, might be brought against the chairman, and that the chairman should for all purposes represent him in such actions. Being his own appointed agent, he had notice of the proceedings. If he had been resident in the colony, he could not have made himself party to the action, or in any manner personally interfered in the proceedings.

(*a*) No action of debt as on matter of record, would have lain here upon the colonial judgment. The remedy would have been either by action of debt *quasi ex contractu*, in which a defendant might formerly have waged his law, or by action of assumpsit.

(*b*) 8 *Bligh, N. S.* 301.

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The 5th section of the act extends the remedy by execution to new shareholders who, but for this enactment, would not have been liable upon contracts to which they were not originally parties. Then comes the 7th section, which reserves all liabilities the parties would otherwise have been under. The object of the act was to create an additional remedy. It contains no exemption from liability. I think, therefore, that the first count of the declaration is good, and that the fourth plea shews no sufficient answer to it.

The tenth plea, which is pleaded to the subsequent counts framed on that cause of action upon which the judgment declared upon in the first count was founded, does not affect the contracts declared upon in those counts; it relates only to the manner of proceeding for the purpose of enforcing payment. It may be true, that, in the colony, no further proceeding could be taken. There, the debt had become matter of record, but it is not so in the English courts. Here, the right to sue upon the original causes of action remains, there being in our courts no merger of those causes of action in a higher remedy. I think, therefore, that the tenth plea is also bad.

Talfourd, J. I am of the same opinion. As to the first question, it appears to me that the first count discloses a good cause of action. The object of the colonial law was, not to take away any remedies which the creditor of the bank would otherwise have had, but to give additional and peculiar remedies.

The second question is, whether the fourth plea presents any answer to the cause of action set forth in the first count. That plea states that the defendant was never resident in *New South Wales*, and had no notice of the proceedings. The answer to that is, that the defendant was a member of a partnership carrying on

business in the colonies, and was contented to leave his property there to be regulated by the law of the colony.

The case of *Smith* v. *Nicolls* (*a*) is conclusive against the tenth plea. It would be absurd to hold that a colonial judgment was in this country merely matter of inducement to a promise, and yet that it operated as a bar to an action on the causes of action upon which that judgment was founded.

Judgment for the plaintiffs. (*b*)

(*a*) 7 *Scott*, 147, 5 *New Cases*, 208.

(*b*) And see *Rastrick* v. *The Derbyshire, &c., Railway Company*, 9 *Exch.* 149.

BUTTIGIEG *v.* BOOKER and Another.

June 1.

To an action by the payee against the acceptors of two bills of exchange, the defendants pleaded,—that the bills were accepted by them and one *B.*, and not by them alone; that, before the bills became due, and before the delivery thereof to the plaintiff, they were and continually from the time of their acceptance had been in the hands of the drawers for value, and had not been during all that time delivered over to the plaintiff by the drawers, and so continued from the times of their becoming due until the making of the agreement after mentioned; that, whilst the bills were so in the hands of the drawers, and before the delivery thereof to the plaintiff, it was agreed between the drawers and the defendants and *B.*, that, in consideration of the defendants and *B.* paying the drawers 500*l.* in settlement of their accounts, the drawers engaged to accept their (the defendants' and *B.'s*) dividend of 2*s.* 9*d.* in the pound on (amongst others) the bills in question, and which the drawers bound themselves to deliver to the defendants and *B.* within one month, receiving the said dividend on each acceptance as it should be delivered up,—the defendants and *B.* being at liberty to pay the said composition on the said bills at any time within one month, and to tender the same at a certain place; that a penalty of 500*l.* was to be paid on default by either side; that the 500*l.* were paid by the defendants and *B.* to the drawers in settlement of the said accounts, and the composition duly tendered; that the drawers refused to accept the dividends tendered, and failed to deliver up the acceptances, but afterwards, in fraud and violation of the agreement, delivered the bills declared on to the plaintiff; and that the plaintiff took, and held the bills with notice of the premises:—

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name and style of *M'Dowell* & Sons, to wit, on the 3rd of *July*, 1847, in parts beyond the seas, made their bill of exchange, directed to the defendants, and thereby required the defendants to pay to the plaintiff 250*l.* sixty days after sight, and then delivered the same to the plaintiff; that the defendants afterwards saw and accepted the said bill, &c., and that sixty days &c. had elapsed before the commencement of the suit, &c.

There was a second count upon a similar bill for 225*l.* 11*s.* 6*d.*, and also counts for money paid and for money due upon an account stated.

Eighth plea.

The defendants pleaded, — eighthly, to the first and second counts respectively, that the two bills in those counts respectively mentioned were accepted by the defendants and one *William Lane Booker*, and not by the defendants alone; and that, at the time they respectively became due, and before the delivery thereof to the plaintiff as thereinafter mentioned, the said two bills were and had been continually from the time of their acceptance in the hands of the said *M'Dowell* & Sons for value, and had not been during all that time delivered over to the plaintiff by *M'Dowell* & Sons, and so continued from the times of their becoming due until the time of making the agreement thereinafter mentioned; that, whilst the said bills were so in the hands of *M'Dowell* & Sons for value, and before

Held, that, assuming the plea to contain a defence to the action, — which the court inclined to think it did not, — it was well put in issue by the general replication *de injuriâ*.

To a similar plea, alleging the agreement to have been made between the plaintiffs, through the drawers as their agents, and the defendants and *B.*, and averring the payment of the 500*l.* and the tender of the dividend to the drawers, with notice to the plaintiff, — but not alleging that the agreement to take the dividend was accepted by the plaintiff in satisfaction or substitution of the contract on the bills, — the plaintiff replied "that it was not agreed by and between the plaintiff, by and through the drawers as their agents, and the defendants, in manner and form as in the plea alleged:" —

Held, that the plea was bad in substance.

Whether the replication was good, *quære.*

the said delivery thereof, it was agreed by and between *M'Dowell* & Sons and the defendants and *W. L. Booker*, that, in consideration of the defendants and *W. L. Booker* paying to *M'Dowell* & Sons 500*l.* in settlement of their (the said *M'Dowell* & Sons' and the defendants' and *W. L. Booker's*) differences of account, they, *M'Dowell* & Sons, thereby agreed to accept their, the defendants' and *W. L. Booker's*, dividend of 2*s.* 9*d.* in the pound on the following bills accepted by the defendants and *W. L. Booker*, and which *M'Dowell* & Sons bound themselves to deliver to the defendants and *W. L. Booker* within one month of the date of that agreement, receiving the said dividend on each acceptance as it should be delivered up, that is to say, [here followed an enumeration of the acceptances of the defendants and *W. L. Booker* in favour of several persons, amongst which was an item of "*G. Buttigieg*, 475*l.* 11*s.* 6*d.*," the amount of the two bills declared on], it being clearly understood between the said *M'Dowell* & Sons and the defendants and *W. L. Booker*, that the defendants and *W. L. Booker* were to be at liberty to pay the said composition of 2*s.* 9*d.* in the pound on the said acceptances, at any time within one month, and to tender the same at &c., where such settlement should take place accordingly, the said *M'Dowell* & Sons holding them, the defendants and *W. L. Booker*, harmless from any further liability on the said acceptances; but, in default of the fulfilment of that agreement within the time specified, on either side, the defaulter to be subject to a penalty of 500*l.*, as liquidated damages: that, the said agreement being so made, and whilst *M'Dowell* & Sons were the holders of the said bills, the defendants and *W. L. Booker* did pay to *M'Dowell* & Sons, and *M'Dowell* & Sons accepted from the defendants and *W. L. Booker* the said sum of 500*l.* in settlement of the said differences of

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account; and that they, the defendants and *W. L. Booker*, further were ready and willing, within one month from the date of the agreement, to pay the said composition on the said acceptances, and did, within one month tender the same to the said *M'Dowell* & Sons, at &c.; and that they, the defendants and *W. L. Booker*, had, from the time of making the agreement hitherto, always been ready and willing to perform the said agreement in all things,—of all which the said *M'Dowell* & Sons then had notice: that *M'Dowell* & Sons refused to accept the said dividend so tendered, and failed to deliver up the acceptances to the defendants and *W. L. Booker*, on the tender being made: that the said two acceptances in the first two counts respectively mentioned were the same as the acceptances of the defendants in the agreement mentioned in favour of *G. Buttigieg* for 475*l.* 11*s.* 6*d.*, and upon which the said dividend was tendered as aforesaid: that afterwards, and after the agreement, *M'Dowell* & Sons delivered the said bills over to the plaintiff, in fraud and violation of the agreement, and which was the delivery in the said first and second counts respectively mentioned; and that the plaintiff took the said bills with notice of the said premises, and, with such notice, from thence continually had held and still held the same,—verification.

Replication and demurrer.

To this plea the plaintiff replied *de injuriâ;* and the defendants demurred specially to the replication, on the ground that the general replication *de injuriâ* is inapplicable to a plea in accord and satisfaction. Joinder.

Ninth plea.

The defendants further pleaded, ninthly, to the first and second counts, that the bills in those counts respectively mentioned were accepted by the defendants and *W. L. Booker;* and that, after the acceptance of the bills, and after they became due, it was agreed between the plaintiff, by and through *M'Dowell* & Sons, as his agents,

and the defendants and *W. L. Booker* [setting out an agreement to the same effect as that stated in the eighth plea, except that the plaintiff, instead of *M'Dowell* & Sons, bound himself to accept the dividend of 2*s.* 9*d.* in the pound, and to deliver up the acceptances]: that the defendants and *W. L. Booker* paid, and *M'Dowell* & Sons accepted and received, the 500*l.*, according to the agreement, and the defendants and *W. L. Booker* tendered the dividend at &c., according to the agreement,—of all which the plaintiff had notice: and that the plaintiff refused to accept the dividends, and failed to deliver up the acceptances, &c.,—verification.

Replication to the ninth plea.

To this plea the plaintiff replied, that it was not agreed by and between the plaintiff, by and through the said *M'Dowell* & Sons, as his agents, and the defendants, in manner and form as in the ninth plea alleged.

Special demurrer, and joinder.

Demurrer to the eighth plea.

Wordsworth, in support of the demurrers. The replication *de injuriâ* is inapplicable to the eighth plea, which is a plea in accord and satisfaction. Where the plea amounts to matter of *discharge*, and not of *excuse*, *de injuriâ* is not the proper replication: *Jones* v. *Senior*.(*a*) [*Cresswell*, J. How is this a plea in discharge?] It sets up an agreement whereby the defendants are discharged from their implied promise to pay the amount of the bills to the plaintiff. [*Cresswell*, J. Rather, the defence suggested, is, that the defendants never did promise at all.] At all events, the plea is an argumentative denial of the promise alleged in the declaration. In 2 *Wms. Saund.* 295 *a*, n. (*d*), it is said: "This replication is not to be allowed where the plea is in denial, and not in excuse; as, where it amounts to the

(*a*) 4 *M.* & *W.* 123, 6 *Dowl. P. C.* 701.

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general issue, or where, in assumpsit or debt, the plea amounts to a denial, *either direct or argumentative*, of the contract, or the breach of it, on which the action is founded,"—citing *Solly* v. *Neish*. (*a*) [*Maule*, J. The new rules of pleading give rise to a difficulty in cases of this sort: the plea of *non assumpsit* is not allowed; and those matters must be specially set out which prevent the inference arising from the drawing and delivery of the bill, from holding good in the particular case. If, therefore, the plaintiff is precluded from putting all these matters in issue, and is confined to a traverse of some one material allegation in the declaration, he is placed at great disadvantage.] Then, the replication to the ninth plea is also bad, inasmuch as it puts in issue two material questions, not only traversing the fact of the agreement, but also that it was made with *M'Dowell* & Sons as agents of the plaintiff. The traverse is also too narrow, denying only the agreement between the plaintiff *and the defendants*, whereas the plea alleges an agreement between the plaintiff and the defendants and *W. L. Booker*,—Stephen on Pleading, 5th edit. pp. 279, 280.

As to the ninth plea.

As to the eighth plea.

Warren, contrà. The agreement set out in the eighth plea affords no defence against the plaintiff's right to recover on the bills. In *Mitchell* v. *Craig* (*b*), to a declaration against the acceptor of a bill of exchange for 16*l.* 12*s.*, drawn by *F.* & *G.*, and indorsed by them to the plaintiff, the defendant pleaded,—first, that, after the bill became due, *F.* & *G.*, being then the holders, applied to the defendant for payment of the bill; that the defendant paid them 7*l.* 2*s.*, which, together with the price of a horse which the defendant had sold to *F.* & *G.*, and the price of which it was

(*a*) 2 *C. M.* & *R.* 355, 4 *Dowl. P. C.* 228.

(*b*) 10 *M.* & *W.* 367, 2 *Dowl. N. S.* 252.

agreed between them should be set off and allowed against the defendant's acceptance, *F.* & *G.* accepted in satisfaction and discharge of the bill; and that the bill was not indorsed to the plaintiff until after the said satisfaction and discharge, and after it became due,—secondly, that, before the bill came into the possession of the plaintiff, it was indorsed in blank by *F.* & *G.* to *C.* & Co., and that, after it became due, it being then in the hands of *C.* & Co., *F.* & *G.* gave *C.* & Co. another bill, accepted by them, for the same amount, which *C.* & Co. received on account of the first-mentioned bill, and which was paid by *F.* & *G.* at maturity; that, after the second bill was so given, the defendant paid to *F.* & *G.* 7*l.* 2*s.*, &c. (as in the first plea); and that, at the time of the giving of the second bill by *F.* & *G.* as aforesaid, and at the time of the said settlement between the defendant and *F.* & *G.*, the bill in the declaration mentioned remained in the hands of *C.* & Co., and was not indorsed to the plaintiff until after the giving of the second bill by *F.* & *G.*, nor until after it became due. To each of these pleas the plaintiff replied, "that the said plea, and the statements therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact, —concluding to the country. It was held, on special demurrer, that the replication was bad, as being an informal *de injuriâ;* and that the pleas were bad in substance, because they did not shew that the sum paid by the defendant, together with the price of the horse, equalled the amount of the bill declared on. The replication *de injuriâ* is the proper replication, assuming the plea to be good. If it amounts to any defence at all, the eighth plea sets up an excuse for the non-performance of the contract in the first and second counts respectively alleged,—that excuse being, that some-

As to the replication.

such a defence is matter in excuse or in discharge, has been often considered, with reference to the admissibility of the replication *de injuriâ*. The effect of the cases of *Humphreys* v. *O'Connell* (*a*) and *Bennett* v. *Bull* (*b*), as also of *Scott* v. *Chappelow* (*c*), in this court, is, to shew, that, inasmuch as the defendant must now state specially several matters which before the new rules he might have given in evidence under *non assumpsit*, the general replication *de injuriâ* must be allowed; for that it was not the intention of those rules to deprive the plaintiff of the power of putting the defendant to the proof of all the matters which constitute the defence alleged in his plea. The meaning of the declaration in the present case, is, that a contract arose from the acceptance and delivery of the bill. That might formerly have been traversed by *non assumpsit*. The new rules, however, have rendered it necessary to state specially the several matters constituting the same defence. I think, therefore, that the replication *de injuriâ* should be allowed. With respect to the replication to the ninth plea, there may be a question whether the objection is not well founded. The case put in *Stephen* on Pleading, 280, resembles this, though there is here an allegation of *modo et formâ*. But, it is unnecessary to decide that here, inasmuch as the plea is bad. It sets up an agreement between the plaintiff and the defendants, that the plaintiff will not sue on the bills, but will accept a composition of 2*s.* 9*d.* in the pound, and that either party making default shall forfeit 500*l.* I think the plea shews no substantial defence to the action; for, it may be that the plaintiff elected to pay the 500*l.*

(*a*) 7 *M. & W.* 370, 9 *Dowl. P. C.* 213.

(*b*) 1 *Exch.* 593.

(*c*) 4 *M. & G.* 336, 5 *Scott, N. R.* 148, 2 *Dowl. N. S.* 78.

found for the plaintiff, damages 31*l.* 10*s.*, the value of the horse.

Bramwell now moved for a new trial, on the ground of misdirection. It may at once be conceded that the defendant could claim no lien for the standing of the horse,—*Judson* v. *Etheridge* (*a*); though an innkeeper has,—*The Case of an Hostler* (*b*); the only question, therefore, will be, whether he had not a lien for the 30*s.*, the surgeon's charge for the blistering. The general rule of law is, that, wherever anything is done by one to the chattel of another (with his consent) to augment its value, he thereby requires a lien upon it. [*Cresswell*, J. Suppose the horse is shod whilst standing at livery, could the livery-stable keeper refuse to allow the owner to use him without first paying the farrier's charge?] In *Scarfe* v. *Morgan* (*c*), where a claim of lien was set up for a charge for covering a mare, *Parke*, B., in giving judgment, said: "The principle seems to be well laid down in *Bevan* v. *Waters* (*d*), by Lord Chief-Justice *Best*, that, where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus, the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges. And all such specific liens, being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases. This, then, being the principle, let us see whether this case falls within it: and we think it does. The object

(*a*) 3 *Tyrwh.* 954.
(*b*) *Yelv.* 66.
(*c*) 4 *M. & W.* 270.
(*d*) *M. & M.* 235.

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is, that the mare may be made more valuable by proving in foal. She is delivered to the defendant that she may by his skill and labour, and the use of his stallion for that object, be made so; and we think, therefore, that it is a case which falls within the principle of those cited in argument." It was a mistake to say that the defendant altogether lost his lien because the horse had originally come into his possession in his character of a livery-stable keeper.

WILDE, C. J. I think the ruling of my Brother *Maule* was perfectly right. The horse in question was placed at livery at the defendant's stables. Whatever may have been its origin, the meaning of that contract is now very well understood, viz. that the horse shall be at all times at the use and command of the owner, without any claim of lien on the part of the livery-stable keeper for the keep. Here, however, it is said, that, inasmuch as the defendant had employed a veterinary surgeon, at the plaintiff's request, to exercise his professional skill upon the horse, he at all events had a lien for the surgeon's charge; for, that the defendant being liable to and having actually paid the veterinary surgeon's charge, it was the same as if the work had been done by the defendant himself. Suppose the veterinary surgeon had treated the horse unskilfully, and damaged it, who would have been responsible to the owner, the livery-stable keeper or the surgeon? Clearly not the former. The veterinary surgeon had no lien for his bill, the livery-stable keeper none for the keep of the horse.

CRESSWELL, J. I am of the same opinion. The defendant had no lien for his demand for the keep of the horse, and the veterinary surgeon had none for his attendance; and there is no rule of law giving a livery-

stable keeper a lien for money expended upon a horse standing at livery at the request of the owner. The case, therefore, does not fall within the rule of law which confers a lien upon one who expends his money or his labour upon a chattel of another.

The rest of the court concurring,

Rule refused.

June 4.

PETTMAN v. KEBLE.

DEBT, for money paid for the use of the defendant, at his (implied) request, and upon an account stated. Plea: Never indebted.

The plaintiff, a smith at *Margate*, demanded 22*l.* 10*s.*, being the amount he had expended in compromising an action which had been brought against him by *Winter & Rich*, iron-merchants, in London.

The plaintiff, at the request of the defendant, ordered goods of *W. & R.*, telling them the purpose for which they were wanted. Before t' order was given the plaintiff asked *W. & R.* for a list of prices, and, having obtained it, shewed it to the defendant, who, seeing that the price was such that the order could not possibly have been understood, asked the plaintiff if he thought *W. & R.* knew what was wanted; whereupon the plaintiff said, "Oh yes. If anything is wrong, of course you will see me all right." To which the defendant answered, "Yes, I will bear you harmless."

In consequence of some misunderstanding, arising in part probably from a verbal inaccuracy in the letters conveying the order, the goods supplied were useless to the defendant, and were returned to the sellers, who (the intrinsic value of the goods being only about 3*l.*), expended in labour about 42*l.* to make them correspond with the intention of the defendant, but, in so doing, reduced their substance so as to render them useless for his purpose.

The defendant, after considerable delay, persisting in his refusal to take the goods, *W. & R.* sued the plaintiff, and he (as the jury found, with the implied authority of the defendant) compromised the action by the payment to them of 22*l.* 10*s.*, and afterwards brought an action for money paid against the defendant, to recover that sum: —

Held, by *Wilde*, C. J., *Maule*, J., and *Talfourd*, J., that the action lay.

Held, by *Cresswell*, J., that the plaintiff should have defended the action brought against him by *W. & R.*, and that there was no implied authority from the defendant to compromise it.

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At the trial before *Wilde*, C. J., at the sittings in *London* after last term, it appeared that the defendant, a printer, directed the plaintiff, an illiterate boat-smith, to procure iron plates for pressing paper in a printer's press. The plaintiff wrote and sent the following letter to *Winter & Rich*, having previously shewn it to the defendant: —

"*Margate, May* 21, 1848.

"Please to send price of planed plates, about one-eighth thick, and 26 by 21 in. They are for putting between glazed *bords* in pressing sheets of paper in a press in a printing-office. If you *du* not keep them, please to *assertain* where you can get them and send price of each and *i* will send word the number I want."

To this letter the following answer was returned: —

"*Southwark, May* 22, 1848.

"The price for the plates you require will be from 12*s*. to 13*s*. per cwt. Will have to be made for you, Could have them in a week. Waiting your commands," &c.

Plaintiff shewed this answer to the defendant, who said: "On the faith of this letter, I will get you to order me twelve plates. Do you think they know what you want?" The plaintiff said: "Oh, yes. If any thing is wrong, of course you will see me all right." The defendant answered: "Yes, I will bear you harmless."

On the 20th *May* plaintiff wrote to *Winter & Rich*, requesting them to send twelve plates, stating dimensions, and adding: "They want to be *plain* on both sides."

On the 4th *June*, the plaintiff, in answering a letter containing some inquiries respecting the dimensions of the plates, said: "These plates must be *plain*, for they are to be put between glazed *bords* for a printing-press."

Some plates were sent by *Winter & Rich*, but they

were not planed plates, and were totally unfit for the purpose to which they were to have been applied. The defendant refused to receive the plates, and again told the plaintiff that he would indemnify him, and promised to write to *Winter & Rich*, which, however, he omitted to do until *August*.

Planed plates are an article well known in the trade, and bear much higher prices than those mentioned in *Winter & Rich's* letter.

On the 10th *June*, plaintiff wrote to *Winter & Rich*: —"What you cent me of no *youse* to me, *i* stated in my letters the sizes and *i* wanted them plained on each side and what purpose they was for."

The plaintiff returned the plates to *Winter & Rich*, who, without further order, sent them back planed. Being still unfit for the defendant's purpose, he refused to receive them. On the 23rd of *August* the defendant wrote to *Winter & Rich*, complaining of the inconvenience he had been put to, and stating that he had returned the plates to the plaintiff. On the 25th of August, *Winter & Rich* wrote to the plaintiff that they had acted upon his instructions, and that they should not take back the plates. Further correspondence took place between the plaintiff and *Winter & Rich*, in which the latter stated that they had lost the plaintiff's letter of the 21st *May*.

In *April*, 1849, *Winter & Rich* brought an action against the plaintiff for 2*l.* 18*s.* 4*d.*, the original price of the plates, and 42*l.* for cutting and planing them. After plea pleaded, the defendant conferred with the plaintiff and his attorney respecting the action; soon after which the plaintiff compromised the action, by paying *Winter & Rich* 22*l.* 10*s.*, and returning them the plates.

On the part of the defendant, it was contended,—first, that the contract between him and the plaintiff was one of sale, and not of agency; secondly, that assuming it to

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have been a contract of agency, the plaintiff had not followed the authority given to him by the defendant, which was, to procure "planed plates," an article well known in the trade, and that, if through his ignorance or mistake *Winter & Rich* had any right of action against him, it was not a matter against which the defendant had contracted to indemnify him; thirdly, that *Winter & Rich* could not, under the circumstances, have recovered against the plaintiff, and consequently the payment made by him to compromise the action at their suit was a payment made in his own wrong.

His Lordship left it to the jury to say,—first, whether the transaction was one of principal and agent, or of buyer and seller; secondly, whether the plaintiff made the payment to settle the action brought against him by *Winter & Rich*, with the authority of the defendant.

The jury found that it was a transaction of principal and agent, and not of vendor and purchaser; and that the plaintiff had authority from the defendant to make the payment in question; and accordingly they returned a verdict for the plaintiff for the amount claimed, leave being reserved to the defendant to move to enter the verdict for him if the Court should be of opinion that, upon the facts proved, the action would not lie.

Hugh Hill, on a former day in this term, obtained a rule *nisi* accordingly.

Byles, Serjt. (with whom was *Bramwell*), now shewed cause. The evidence clearly establishes the agency of the plaintiff, and that the payment made by him to settle the action brought by *Winter & Rich* was made under the sanction and authority of the defendant. *Winter & Rich* might, at their election, have sued either *Pettman* the agent or *Keble* the principal, as

soon as they discovered him. They elected to sue the agent; and he having by the act of the defendant been placed in a situation to be compelled to make the payment he did, would, according to the authority of *Lewis* v. *Campbell, antè,* Vol. VIII. p. 541., have been entitled to recover the amount from the defendant, even if there had not been the express promise to indemnify. [*Maule,* J. The plaintiff paid the money to settle an action brought by the vendors against him. Was he liable? And, if so, was his liability incurred at the request of the defendant? In *Lewis* v. *Campbell,* there was an express (?) request to pay the money. Here, there was no request. But, if *Winter & Rich* could sue the plaintiff simply in consequence of his having procured the order of the defendant, then he may recover back the money he has paid.] The plaintiff did procure the order of the defendant. It is said he did not follow the instructions he received. Assuming that there was a slight inaccuracy in the order conveyed by the plaintiff to *Winter & Rich,* which would have justified the defendant in repudiating the contract if he had elected to do so promptly, he lost that right by his own laches. The plaintiff was clearly entitled to be indemnified if he acted with reasonable diligence; which upon the facts it is submitted he did.

Hugh Hill and *Barrow,* in support of the rule. The plaintiff was not under any legal liability to make this payment to *Winter & Rich;* and, if he was, he did not incur that liability, or make the payment, at the request or with the concurrence of the defendant. The letter of the 21st of *May,* 1848, asking the prices of "planed plates," no doubt was sent with the defendant's concurrence. The answer was shown to him; and, on the faith of that answer, he requested the plaintiff to order the plates. Accordingly, the order was given in

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a letter of the 30th, in which the plaintiff tells *Winter & Rich* that the plates "want to be *plain* on both sides." Taking that with reference to the letter of the 21st, the order should not have been misunderstood. Again, on the 4th of June, in answer to some inquiry made by *Winter & Rich*, the plaintiff writes,—"These plates must be *plain*, for they are to be put between glazed bords for a printing-press." What pretence is there for saying that *Winter & Rich* had any right to charge the plaintiff with anything? much more, with any part of the 42*l.* for the planing which rendered the plates (by their reduction) useless? In *Jones v. Bright* (*a*), where the plaintiff recovered in an action on the case in the nature of deceit for a breach of an implied warranty on the sale of copper sheathing, *Best*, C. J., in delivering the judgment of the Court, said, "I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that it is merchantable, — that it is fit for some purpose. This was established in *Laing* v. *Fidgeon.* (*b*) If he sells for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise, although there are, doubtless, some dicta to the contrary." And that view is confirmed in *Brown* v. *Edgington.* (*c*) [*Maule*, J. Assuming that *Winter & Rich* had no just cause of action against the plaintiff, there being nothing in the circumstances inconsistent with the exercise of due diligence on his part, was it not the defendant's business to defend him? and does he not, by abstaining from interfering, authorize the plaintiff to make the best defence he could?] He did not make the *best* defence. [*Talfourd*, J. He probably did that which, under all

(*a*) 5 *Bingh.* 533, 3 *M. & P.* 155.

(*b*) 6 *Taunt.* 108, 4 *Campb.* 169.

(*c*) 2 *M. & G.* 279, 2 *Scott, N. R.* 496.

the circumstances, was the most prudent thing that could be done. And the jury have found that the payment was made with the defendant's authority.] The present defendant was under no obligation to defend an action which the plaintiff had brought upon himself by not accurately pursuing his instructions. [*Maule*, J. The indemnity extends to actions wrongly brought against the party, as well as rightly. The agent was entitled to be indemnified, although *Winter & Rich* had no cause of action.] At all events, the action for money paid will not lie, there being no express request. The plaintiff's only remedy, if he has any (which is denied), is, by an action for the breach of the indemnity. This point was left undecided in *Lewis* v. *Campbell.*

WILDE, C. J. This case presents some difficulties. The plaintiff, an illiterate person, was requested by the defendant to order for him an article of which he seems to have had little or no knowledge. He writes a letter to *Winter & Rich*, iron-merchants, and shews it to the defendant, in which he inquires the price of "planed plates." When the answer comes, he takes it to the defendant, who says, "On the faith of this letter, I will get you to order me twelve plates. Do you think they know what you want?" upon which the plaintiff answers, "Oh, yes." But having evidently a slight misgiving, he adds, "If anything is wrong, of course you will see me all right;" to which the defendant answers, "Yes, I will bear you harmless." The plaintiff then gives the order; but, unfortunately, in doing so, he uses a different expression; for, in one letter, he writes, "They want to be *plain* on both sides," and in another he says, "These plates must be *plain*, for they are to be put between glazed *bords* for a printing-press." If *Winter & Rich* had been ordinarily dealing in the particular (highly manufactured) articles, they probably

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would have made more inquiry; but, the order coming as it did from a common boat-smith, they did not expect that anything very special was required. I do not dispute the principle laid down in *Jones* v. *Bright* and that class of cases. But here, the only negligence imputable to the plaintiff, is, the inaccuracy of spelling in his letters of the 20th of May and 4th of June. In other respects, he has acted strictly in accordance with the orders of the defendant. The plates are delivered in an improper state. The plaintiff is requested to return them; and the defendant undertakes to write to *Winter & Rich*. He, however, waits from *June* till *August*. In the mean time, *Winter & Rich* get the plates planed, thereby incurring additional expense. I do not see that the plaintiff has been guilty of such negligence as to forfeit his claim. The main ground of defence here is, that *Winter & Rich* so conducted themselves that they could have no claim against the plaintiff, and consequently that the payment made by him to them to settle their action was a payment in his own wrong. My impression is, that, if he had defended that action, he would have failed. But, however that may be, it is enough to say that he has acted throughout with reasonable caution. He bargains for indemnity; but the defendant, when the difficulty arises, declines to give any direction, but merely repudiates the plates. The plaintiff takes competent advice, and settles the action. I think under the circumstances the plaintiff exercised his best judgment, and acted with reasonable caution, and therefore that there is no ground for disturbing the verdict.

MAULE, J. I also think this rule should be discharged. I think there was evidence on which the jury might properly find for the plaintiff on the count for money paid to the defendant's use at his request. It

appears that the plaintiff was employed by the defendant to order certain plates from *Winter & Rich.* The plates were ordered, and were sent to the defendant, but, being found unsuitable, were returned to *Winter & Rich,* with an intimation from the plaintiff that they had not sent "planed" plates, as ordered. *Winter & Rich* (without any ground, I think,) took that letter as an order to do certain work on the plates, and accordingly caused them to be "planed," and returned them to the plaintiff, with a charge of 42*l.* for the operation which rendered them useless for the purpose for which the defendant required them, and afterwards sued the plaintiff for the amount. I think the plaintiff was entitled to be borne harmless against anything which he might properly pay in consequence of his situation of agent, without any default on his part. I cannot, I must confess, see that the plaintiff has been guilty of any default. There was nothing in his letter to justify *Winter & Rich* in tending the article they did. The defendant, knowing all the circumstances, twice promises to bear the plaintiff harmless. An action having been brought by *Winter & Rich,* the defendant is informed of it, but does not choose to interfere; and in consequence, the plaintiff, in the *bonâ fide* exercise of his best discretion, and acting upon the best advice he could get, settles the matter by paying *Winter & Rich* 22*l.* 10*s.*, and returning them the worthless goods; and he now brings his action to recover back that sum as money paid to the defendant's use. It appears to me that the liability the defendant was under to indemnify the plaintiff, extends to protecting him against the expenses and the trouble and annoyance of an action arising out of his agency in the matter, though that action was one to which he had a good defence. I think the defendant (Keble) ought to have taken upon himself the defence of that action; and that his failure to do so invested the

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plaintiff with an implied authority to act to the best of his judgment, and, if necessary, to pay the money he did pay. There was, I think, abundant evidence whence the jury might infer that the plaintiff in the course he adopted with reference to *Winter & Rich's* action, acted under authority from the defendant to do the best he could, and that the case falls within the principle of *Lewis* v. *Campbell.* Such authority is to be implied as much where a payment is made under a moral necessity in consequence of its being a prudent thing to do, as where the payment is made under legal compulsion. If so, the case falls clearly within the reason of *Lewis* v. *Campbell,* and the verdict may be sustained.

CRESSWELL, J. I think it very likely that justice will be best answered by discharging this rule; and I am not sorry that my Lord and my Brother *Maule* have arrived at that conclusion, though, as at present advised, I am unable to do so, inasmuch as I cannot assent to the soundness of the principle on which their decision proceeds. No doubt, the plaintiff, in the first instance, conducted himself faithfully in giving the order for the goods; and I think *Winter & Rich* had sufficient information as to the description of plates that were wanted. The first letter well described them; and the second was not a perfect order without referring to the first. It seems to me, therefore, that *Winter & Rich* had no cause of action against the plaintiff, and that, if defence had been made, their action must have failed. But, though the defendant's undertaking to indemnify the plaintiff might have extended to the indemnifying him against the consequences of a defence to an action brought against him for anything done by him as agent, which failed, it seems to me, that, there being no right of action, we are not at liberty in a court of law to assume that the verdict in

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that action would have been against the now plaintiff. Nor do I think the defendant, by his promise to indemnify, made the plaintiff his agent to compromise an action in which there was a reasonable probability that the defence would have been successful.

TALFOURD, J. I agree with my Lord and my Brother *Maule* that this rule should be discharged. I do not think it necessary to say whether or not *Winter & Rich* under the circumstances had a good ground of action against the now plaintiff. I think there was evidence that the compromise was made with the authority of the defendant, express or implied. Looking at the whole transaction from beginning to end, I think the jury were well warranted in coming to the conclusion they did. And I think it cannot be doubted, that, under all the circumstances, it was a very wise and discreet compromise. It is by no means certain that the defence would have been successful. I therefore think there is no ground for disturbing the verdict.

Rule discharged.

WICKENS, Demandant; WINDUS, Tenant; SIR JOHN SHELLEY and WIFE, Vouchees.

[*May* 28.

In the exemplification of a recovery, the name of the tenant was inserted in the place of that of the demandant, and *vice versâ*: — Held, that the defect, — which was apparent on the production of the deed to lead the uses,—was cured by the 8th section of the 3 & 4 *W.* 4. *c.* 74.

BROWN moved to amend a recovery by substituting in the exemplification the name of the demandant for that of the tenant, and *vice versâ*. In the exemplification, which was produced in court, and which was dated Hilary Term, 7. *G.* 4., the parties were described as "*William Plummer Wickens*, demandant, *James*

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Stephen Windus, tenant, Sir *John Shelley*, and Dame *Frances*, his wife, vouchees." The deed to lead the uses, which was also produced, showed that *Windus* should have been the demandant, and *Wickens* the tenant. There was also an affidavit explaining how the mistake arose, and stating that the title had been objected to on the ground of the variance. [*Jervis*, C. J. What necessity can there be for an amendment? Is not this precisely a case provided for by the 8th section of the 3 & 4 *W.* 4. c. 74., which enacts, "that, if it shall be apparent from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission?"] That clause was intended to meet a case of misdescription or misnomer. This is not a case of misnomer. [*Maule*, J. Is there not an error in the name of the tenant?] No. The names of both demandant and tenant are correctly stated, but erroneously placed. The 9th section saves the jurisdiction of the court to amend in all cases not provided for by the act. [*Maule*, J. If the court has power to make the amendment asked for, it is in respect of its being a mistake in the names of the parties, and therefore of necessity the error is remedied by the 8th section. In

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Lockington, conusor; *Shipley* and Wife, conusees (*a*); where in the indentures of a fine lands were described erroneously as situate in a parish different from that mentioned in the deed to lead the uses, the court refused to allow it to be amended,—holding the defect to be cured by the 7th section of the act; and in *Evans*, vouchee (*b*), the court refused to permit an old recovery to be amended by the insertion of a parish, the words of the deed being large enough to embrace it, and the omission being consequently cured by the 8th section. And Tindal, C. J., in a subsequent case,—In re *Twisden's* Recovery (*c*), says, that, "Where the error can be rectified by a comparison of the papers in the cause, the court will not amend; but, where the difficulty arises out of a latent fact, I think it falls within the 9th section of the act, and that the amendment may be made."] In *Totton*, dem., *Vincent*, def. (*d*), the court permitted a fine to be amended by introducing the name of an adjacent parish, the deed to lead the uses containing the words, "or any other adjoining parish," the land appearing to have been intended to pass, and possession having gone accordingly. [*Maule* J. Even in that case, the court seem to have thought the amendment unnecessary. Where upon production of the deed to lead the uses the error or misdescription is apparent, an amendment is unnecessary: the statute provides for it. But, where the production of the deed will not cure the defect, the amendment may still be made under s. 9.]

JERVIS, C. J. I think this is the case of an error in the names of the parties. The deed sufficiently shows

(*a*) 1 *Scott*, 263, 1 *N. C.* 355.

(*b*) 2 *Scott*, *N. R.* 83.

(*c*) 4 *N. C.* 253, 5 *Scott*, 638.

(*d*) 7 *Scott*, 835, 5 *N. C.* 626

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how it was intended that the parties should be described. The defect, therefore, is remedied by the 8th section of the statute, and no amendment is necessary.

The rest of the court concurring,

Rule refused.

April 18.

A., more than twenty years ago, without the permission of the lord, inclosed a small portion of the waste of a manor, on which he built himself a hut. In 1835, the incroachment having been presented at the lord's court, the then lord of the manor, accompanied by his steward, went to the premises, *A.*'s family being there, and, stating that he took possession, directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done in the absence of *A.* The lord and his steward then retired, and nothing more was done: —

Held, that the acts so done by the lord did not amount to a dispossession of *A.*, and a resumption of possession by the lord, so as to entitle the latter to maintain ejectment within twenty years from that time.

DOE d. BAKER *v.* COOMBES.

THIS was an action of ejectment brought by the defendant, the lord of the manor of *Pitfold*, in the county of *Surrey*, to recover the possession of an acre of land, part of the waste of the manor, with a hut erected thereon, which had been many years occupied by the defendant.

The cause was tried before *Wilde*, C. J., at the last *Spring* Assizes for *Surrey*. The evidence was as follows: —

The land in question, which was situate on a spot called *Melcomb-Bottom*, forming part of the waste of the manor of *Pitfold*, in the county of *Surrey*, was inclosed, and the hut erected by the defendant, without the permission of the lord of the manor, considerably more than twenty years before the commencement of the action. In the year 1835, this incroachment having been presented at the lord's court, Mr. *Pritchard*, the then lord of the manor, accompanied by one *Woods*, the steward, went to the premises, and, finding the defendant's wife and

family there, he entered, and stated that he took possession, and directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done without any objection being made on the part of *Coombes*, who was not then on the spot. *Pritchard* and the steward then retired.

His Lordship being of opinion that this was not such a taking of possession by *Pritchard* as to entitle the lessor of the plaintiff, who claimed under him, to maintain ejectment, directed the jury to find for the defendant, which they accordingly did.

Montagu Chambers, for the lessor of the plaintiff, now moved for a new trial, on the ground of misdirection. The question is, whether that which was done by *Pritchard* in the year 1835 did not amount to such a taking possession of the land and hut by him as lord of the manor, as to determine the previous tenancy at will as between him and *Coombes*. [*Williams*, J. What evidence was there of a tenancy at will?] A tenancy at will is to be inferred where a man continues in possession of land with the acquiescence of the lord, and without evidence of any other relation between them; and such tenancy will be assumed to continue until the contrary appears. If that be so, the possession of the defendant here dates only from the year 1835. Since the 3 & 4 *W.* 4. *c.* 27. *s.* 10 (*a*), it is true, a mere entry is not enough to determine the tenant's possession. But here something more was done. The lord entered, and took possession as of his own property, without any dissent on the part of the tenant. He thereby acquired such a possession as would have

(*a*) "No person shall be deemed to have been in possession of any land within the meaning of this act, merely by reason of having made an entry thereon."

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enabled him to maintain trespass. [*Talfourd*, J. Did he turn the defendant and his family out?] No; but he exercised acts of ownership. The distinction is taken in *Co. Litt.* 55. b.:—"There is an express ouster and an implied ouster; an express, as, when the lessor cometh upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as, if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue. If a man leaseth a manor at will, whereunto a common is appendant,—if the lessor put in his beasts to use the common,—this is a determination of the will. The lessor may, by actual entry into the ground, determine his will in the absence of the lessee; but by words spoken from the ground the will is not determined until the lessee hath notice. No more than the discharge of a factor, attorney, or such like, in their absence, is sufficient in law until they have notice thereof." Assuming this to have been a tenancy at sufferance, the acts done by *Pritchard* in 1835 would be a determination of that tenancy; and a new tenancy commenced at that period. [*Talfourd*, J. You would assimilate this to the case of *Doe* d. *Bennet* v. *Turner*. (*a*) *Wil-*

(*a*) 7 *M.* & *W.* 226. There, *A.*, in 1817, let *B.* into possession of lands as tenant at will; and, in 1827, *A.* entered upon the lands without *B.*'s consent, and cut and carried away stone therefrom: and it was held, that this entry amounted to a determination of the tenancy at will, and that *B.* thenceforth became tenant at sufferance, until, by agreement, express or implied, a new tenancy was created between the parties; and, therefore, that, unless the fact of such new tenancy were found by the jury, an ejectment brought by *A.* in 1839 was too late, inasmuch as, by the statute 3 & 4 *W.* 4. *c.* 27. *s.* 7., his right of action *first* accrued

liams, J. You must make out an original tenancy at will, and a new tenancy at will; and there is no pretence for either.] That which was done by *Pritchard* in 1835 was done for the express purpose of preventing any title growing against him.

Wilde, C. J. I think this case admits of no doubt. The question turns upon that which took place in the year 1835. Up to that time there clearly was no tenancy at will. It appeared, that, at the time the inclosure was originally made, *Coombes* applied to the lord for leave to make it, and that it was refused, and the inclosure was made and the hut afterwards built without leave. His possession therefore was adverse; and, unless the acts done in 1835 deprive the defendant of the benefit of the statute of limitations, this ejectment cannot be maintained. What, then, was done upon that occasion? *Pritchard* went with his steward to the cottage, the defendant not being there, and, removing a stone from the wall, and displacing a portion of the fence, stated that he took possession. The defendant's wife and family were not removed from the premises, or desired to remove. Unfortunately for the lord, he did not do enough to secure his rights. The defendant is not to be prejudiced by what was thus done in his absence. I left it to the jury to say whether the lord had done enough to acquire possession. They found that he had not; and in truth there was nothing to leave to them. The acts done by *Pritchard* clearly amounted to no more than an entry, which since the late statute is not enough to bar the tenant's right unless accompanied by circumstances which would restore the possession of the land to the lord. The tenant was

at the expiration of one year after the commencement of the original tenancy at will, *i. e.*, in the year 1818.

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			£	s.	d.
1849.	April 7.	Oats - - -	4	8	0
		Tares - -	1	10	0
	May .	Oats - - -	1	7	0
	July 12.	Journey - -	2	2	0
		Expenses - -	0	10	6
		Very many attendances -	6	16	0
			£27	16	0
		Received from William Pinnock -	8	5	3
			£19	10	9
		Commission - -	0	8	0
		Receipt stamp -	0	0	3
			£19	19	0

The affidavit of the defendant and his attorney, upon which the rule was moved, stated, that both plaints came on to be heard before the judge of the county-court on the 20th of March, 1850, plaint C. 143. being first called on; that the defendant's attorney objected that the judge had no jurisdiction, because (as disclosed by the particulars) the demand exceeded 20*l.*, though reduced below that sum by a credit for 8*l.* 5*s.* 3*d.* given without the defendant's consent; and that the judge overruled the objection, heard the case, and gave judgment for the plaintiff for 17*l.* 9*s.*, and costs 5*l.* 1*s.*; that plaint C. 142. was then called on, when the defendant's attorney objected that the judge had no jurisdiction, because the subject-matter of that and the preceding plaint together constituted but one cause of action, exceeding 20*l.*, and that it was not competent to the plaintiff to split them; and that this objection also was overruled by the judge, who, after hearing the case, gave judgment for the plaintiff for 17*l.*, costs 4*l.* 8*s.* 6*d.*

Hawkins now shewed cause. Execution having been executed in this case, the application for a prohibition is too late; there remains nothing upon which it could operate: *Hall* v. *Norwood* (*a*); *Re Poe* (*b*); *Robinson* v. *Lenaghan.* (*c*) [*Williams*, J. In the Articuli Cleri, 2. Inst. 602., in the answer to Art. 3., it is said that "the king's courts that may award prohibitions, being informed, either by the parties themselves, or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment *and execution* as before." *Wilde*, C. J., referred to Com. Dig. *Prohibition* (D.), and to *Roberts* v. *Humby* (*d*).]

Then, as to the merits, there was no splitting of a cause of action here, within the case of *Grimbly* v. *Aykroyd.* (*e*) When the first plaint was heard, it did not appear that the plaintiff had any further claim against the defendant. In *Neale* v. *Ellis* (*f*), the Brighton Court of Requests Act (3 *Vict. c.* x. *s.* 24.) provided that it should not be lawful for any plaintiff to divide any cause of action into two or more suits for the purpose of bringing the same within the jurisdiction of the court, but that any plaintiff having a cause of action above the value of 15*l.*, might sue for 15*l.*, and abandon the excess: and it was held, that a plaintiff having demands for the price of a horse, for goods sold and delivered, and for rent, against the defendant, was entitled, after having sued for and recovered 15*l.* in respect of the horse by plaint in the county court, to maintain his action in the superior court for the residue of his claim; for that the three causes of action were distinct, and there had been no division of

(*a*) 1 *Sid.* 166.
(*b*) 5 *B.* & *Ad.* 681.
(*c*) 2 *Exch.* 333.
(*d*) 3 *M.* & *W.* 120.
(*e*) 1 *Exch.* 479.
(*f*) 1 *D.* & *L.* 163.

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them for the purpose of bringing them within the jurisdiction of the inferior court, or any abandonment of the excess over the 15*l.* recovered in that court. Here, the items in the two plaints are in no way connected with each other. In *The King* v. *The Sheriff of Herefordshire* (*a*), A. became indebted to B. in a sum not exceeding 40*s.* for the carriage of a parcel of goods, and a month afterwards incurred another debt to B. not exceeding 40*s.* for the carriage of a second parcel. For these respective debts, A. brought two actions in the county court; and it was held that the causes of action were distinct, and that A. was entitled to sue separately for each demand; and an application for a prohibition was refused, Lord Tenterden saying,—" I am of opinion that this case does not come within the rule of law which prohibits the splitting of a cause of action into several portions for the purpose of commencing suits for each in an inferior court; to be so, the cause of action must be one and entire. But, in this case, the two items of 1*l.* 4*s.* each are perfectly distinct debts, the one having no connection with the other. When the defendant incurred the debt stated in the first item, the plaintiff might have sued him for it in the county court; and his having incurred another and distinct debt with the plaintiff afterwards, should not, I think, have the effect of depriving the plaintiff of his remedy in the county court for the first debt. And if he may still have that remedy for the first debt, he has it of course for the second also." [*Williams*, J. As applied to this act, that is hardly reconcileable with *Grimbly* v. *Aykroyd.*] It may be, that, where the items are continuous and of the same description, the demand cannot be split: but this is not a case of that sort; the demands here are separate and distinct. In *Wickham* v.

(*a*) 1 *B. & Ad.* 672.

Lee (*a*), it was held that it is not a dividing of the cause of action, within the 9 & 10 *Vict. c.* 95. *s.* 63., to levy one plaint for rent of premises, and another (under the 4 *G.* 2. *c.* 28. *s.* 1) to recover double value for holding the same premises after the expiration of a notice to quit. [*Maule*, J. In Jagoe's County Court Practice, 52, I find an Irish case upon this subject, which is thus stated,—" Splitting demands, prohibited by the Irish statutes (*b*) in nearly the same words as in this section, has been a subject of judicial consideration in a case on appeal before Bushe, C. J., at the Dundalk Summer Assizes, 1833 :—The plaintiff below brought a civil bill for use and occupation, to recover one gale of rent. There were two gales due at the time, which together amounted to a sum exceeding the jurisdiction, but separately were within it. The plaintiff below obtained a decree, against which the defendant appealed. For the appellant it was contended that the case came within the prohibitory words of the statute, as the two gales might clearly have been included in one declaration, and that it was vexatious to divide the claim. For the respondent it was argued, that the true test was, not whether the claim might be joined in the same declaration; and that a debt might by mutual arrangement be divided into several aliquot parts, and a promissory note taken for each part, which was frequently done for the purpose of making the summary remedy by civil bill attach, to recover each separately, which could not be the case while the demand was entire and undivided. Bushe, C.J., referred to the case of *Cairns* v. *Whelan* (*c*), as bearing upon the question, and was at first inclined to consider the decree erroneous: but Mr. *Hannan, Amicus Curiæ,* having referred

(*a*) 12 *Q. B.* 521.
(*b*) Courts of Conscience Acts.
(*c*) *Hudson & Brooke,* 552.

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him to the case of *The King* v. *The Sheriff of Herefordshire* (*a*), the chief justice on the next day stated that that case was so much in point as to put an end to any further difficulty, and affirmed the decree."] The mere statement of the defendant that the subject-matters of the two plaints form but one cause of action, is not enough to oust the jurisdiction of the county court. There must be some evidence to which the judge may apply his discretion. *Vines* v. *Arnold* (*b*), *Woodhams* v. *Newman* (*c*), and *Beswick* v. *Capper* (*d*), were also cited.

Lush, in support of his rule. The particulars of demand shew that the plaintiff's claim in respect of plaint C. 143., was for 27*l.* 16*s.*, and that there was a set-off reducing it to 19*l.* 19*s.* [*Maule*, J. Consistently with what appears on the affidavit, the 19*l.* 19*s.* might have been ascertained as a liquidated balance.] The matter being *primâ facie* beyond the jurisdiction of the county court, it is for the plaintiff to shew facts to bring the case within it. In *Cole* v. *Knight* (*e*), where the plaintiff, having an original claim against the defendant for more than 20*l.*, gave credit for certain sums as payments on account, some of which were in fact moneys lent to him by the defendant, others, moneys received by him to the defendant's use, and others, moneys the produce of goods of the defendant which the plaintiff had sold, and the proceeds of which he had appropriated; and the plaintiff by this, and by abandoning the remainder, reduced his claim below 20*l.*, and brought a plaint in the county court,—this court awarded a prohibition. Although the judge must exercise his discretion at the time as to whether or not the case is within his jurisdiction, his

(*a*) 1 *B. & Ad.* 672.
(*b*) *Antè*, Vol. VIII. p. 632.
(*c*) *Antè*, Vol. VII. 654.
(*d*) *Ante*, Vol. VII. p. 669.
(*e*) *New County Court Cases*, 164.

decision is not conclusive, but may be reviewed on a motion for a prohibition: *Thompson* v. *Ingham.* (*a*) The subject-matter of the two plaints here constituted one "cause of action," as that is explained in the judgment of the Court of Exchequer in *Grimbly* v. *Aykroyd.* If the whole formed one cause of action in that sense, the jurisdiction clearly is exceeded. The case of *The King* v. *The Sheriff of Herefordshire* is distinctly overruled by *Grimbly* v. *Aykroyd,* and by the test suggested by *Erle,* J., in *Wickham* v. *Lee.* It is clear that all these demands might have been included in one count.

WILDE, C. J. This case has undergone some considerable discussion, the court being anxious not to run counter to any of the authorities. In the result, however, it does not occur to me that it presents any very serious difficulty. This is an application for a prohibition, on the ground that the county court has exceeded its jurisdiction. Let us see how the matter is presented before us. The affidavits upon which the rule was moved, state that two plaints were entered in the county court against the defendant, at the suit of the plaintiff,—the one for 19*l.* 0*s.* 8*d.* for money lent and interest,—the other for 19*l.* 19*s.*, being the balance of an account for work and labour and goods sold, amounting originally to 27*l.* 16*s.*; and that these two sums added together exceed the amount for which the county court has jurisdiction. The affidavits then go on to allege, that both plaints were heard on the same day; that, when the first was called on, the defendant's attorney objected to the hearing thereof, on the ground that the judge had no jurisdiction, inasmuch as the particulars of demand disclosed a cause of action exceeding 20*l.*, which could not be reduced by the set-off (also

(*a*) 14 *Q. B.* 710.

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disclosed by the particulars), so as to bring it within the jurisdiction, in the absence of an adjustment or ascertainment of the balance by the assent of both parties; and that the judge over-ruled the objection, heard the case, and made an order upon the defendant to pay 17*l.* 9*s.* for debt, and 5*l.* 1*s.* for costs. The affidavit further states that the other plaint was then called on, when the defendant's attorney objected, that, as the plaintiff's claim in the whole amounted to 39*l.* in respect of one entire cause of action, it was not competent to him to split it for the purpose of bringing two actions in the county court; and that the judge notwithstanding proceeded to hear the plaint, and made an order on the defendant to pay the sum demanded (19*l.* 0*s.* 8*d.*), and costs. The defendant himself, by affidavit, negatives that there was any settlement of accounts between himself and the plaintiff, or any agreement that the set-off should be allowed. So far, therefore, as regards the first plaint, this is a case in which the county court has given judgment for the plaintiff for 17*l.* 9*s.* There is not a word in the affidavits as to how that amount is made up. It is not stated that it was reduced by a set-off. Beyond all doubt, it is the duty of a party who comes to this court to ask for a prohibition to lay before it proper grounds for inducing it to come to the conclusion that there has been an excess of jurisdiction on the part of the inferior tribunal. How does that appear here? The affidavits merely state, that, on the plaint being called on, the defendant's attorney objected to the hearing, but that the judge, notwithstanding that objection, heard and disposed of the plaint. Was it the duty of the judge to yield to an objection thus presented to him? How could he anticipate what the case would be? It might have been shewn that the sum sought to be recovered was an agreed balance. The objection is not, that, at the conclusion of the case, an excess of

jurisdiction appeared. The case, then, stands thus:— There was a plaint in which the plaintiff claimed 19*l.* 19*s.*, and a judgment given for the plaintiff for 17*l.* 9*s.* and costs, without anything to shew that the judge in any way exceeded his jurisdiction. The only objection disclosed by the affidavits was one that was perfectly unfounded, and very properly over-ruled by the judge. The present case is wholly beside that of *Beswick* v. *Capper*. There, it appeared that the plaintiff was allowed in the county court to prove a demand of 227*l.* 2*s.* 8*d.*, and to reduce the amount by a set-off of 186*l.* 16*s.* 9*d.*, and then to abandon so much of the balance as exceeded 20*l.*, and so to take a verdict for 20*l.* It, therefore, appeared affirmatively to the court in that case that the judge of the county court had gone into matters much beyond his jurisdiction. Here, however, there is no one fact to lead the court to the conclusion that there has been any excess of jurisdiction, and, consequently, so far as regards the plaint which was first heard in the county court, no ground for a prohibition.

As to the other plaint also, I am of opinion that the plaintiff has failed to make out a case for the interposition of this court. That part of the case stands upon a different footing. The plaintiff claimed 19*l.* 0*s.* 8*d.* for money lent. The objection was, that that demand, though presented as a separate and distinct demand, was, in truth, only part of a larger demand which exceeded the amount to which the jurisdiction of the county court is limited. Suppose the prohibition were to go, what would be its effect? What would the plaintiff recover on that account, if he sued in the superior court? Why, 19*l.* 0*s.* 8*d.* only. Why should he not proceed for that in the county court? The case is precisely one that is provided for by the statute. If a plaintiff, suing in a county court, proves a demand

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exceeding the limits of the county court's jurisdiction, he will be nonsuited unless he will consent to abandon the excess; and the fact of his having done so must be recorded on the face of the judgment. Nothing of that kind was done here. At the time this plaint was heard, the demand thereby sought to be recovered was the only demand which the plaintiff had against the defendant; for, he had already recovered a judgment of the same court for the other part of his demand, and 19*l.* 0*s.* 8*d.* was all he could be entitled then to recover in any court. But, independently of that, this is a demand for money lent. The other was for work and labour, goods sold and delivered, and for commission. It is insisted that the whole formed but one entire debt. What evidence was there of that? It did not appear that the parties had ever treated it as one entire demand; and the items do not necessarily shew that it formed one account. Both grounds, for a prohibition, therefore, fail, and the rule must be discharged.

MAULE, J. I am of the same opinion. The Lord Chief Justice has gone so fully into the reasons on which the judgment of the court is founded, that it is enough for me to say that I entirely concur in the view he has taken. With respect to the case of *Thompson* v. *Ingham*, the record conclusively shewed that the title to the land came in issue in the county court. Here, nothing appears to shew that a question of a larger sum than 20*l.* was in issue. If it had appeared that a larger sum than 20*l.* was in issue, and that the county court had decided on a controverted question whether that was so or not, if he had no jurisdiction to entertain a claim exceeding 20*l.*, we should have been bound to treat it as a case of excess of jurisdiction. I do not, however, think that that is so. If the party, having a demand for more than 20*l.*, chooses to claim no more,

he may recover that sum, electing to abandon the rest. There is, therefore, a manifest difference with respect to the jurisdiction of the county court, between the implied prohibition as to debts exceeding 20*l.* and the prohibitory clause as to matters of title. That materially distinguishes the case of *Thompson* v. *Ingham* from the present case.

WILLIAMS, J. I am of the same opinion. A prohibition ought not to go unless it clearly appears that the judge of the inferior court has acted without jurisdiction. The burthen of making that out is cast upon the party making the application. I am not satisfied, upon the affidavits, that the subject-matter of the two claims here constituted "one cause of action," within any reasonable interpretation of the 63rd section of the act. With regard to the point made as to the set-off, all that the affidavits disclose, is, that there was a premature objection urged on the part of the defendant at the trial, which the judge very properly over-ruled.

TALFOURD, J. I am of the same opinion. As to the main question, the case seems to me to differ materially from that of *Grimbly* v. *Aykroyd.* There is nothing here giving a common character to the two sets of items, as there was in that case, except that the whole might have been included in one declaration. In *Grimbly* v. *Aykroyd* there was one entire system of dealing, the demand arising all out of one state of things. This rule, therefore, may well be discharged without at all interfering with the authority of that case.

Rule discharged, with costs.

WILLIAMS and Another v. GRAY and NORMANSELL.

June 7.

Under an interpleader order a bond in the penal sum of 200*l.* was given by *C.* and *D.*, as sureties for *B.* who claimed certain goods seized under a *fi. fa.* at the suit of *A.*, conditioned to be void,—"if upon the trial of an issue it should be found that the goods in the order mentioned were, or any of them were, at the time of the seizure, the property of *B.*,"—"or, if *B.* should *proceed to try* the said issue in due time according to the terms of the said order, or according to the course and practice of the said court, according to the said order, or any further order of any judge to be made in that behalf,"—"or, if *B.* should pay or cause to be paid to *A.* the sum of 200*l.*, or so much thereof as should be the value of the said goods, or such part of the same as might be found not to be the property of *B.*"

In an action upon the bond, against the sureties, the declaration, after setting out the condition, stated that the issue came on to be tried at a certain sitting, and that the jury were, with the consent of *A.* and *B.*, discharged from giving any verdict thereon; and that afterwards a further order was made, whereby it was ordered that *B.* should proceed to the trial of the issue at a certain other sitting, and that, in default thereof, his claim should be barred; and alleged for breach, that *B.* did not at the last-mentioned sittings, or at any other time after the making of the last-mentioned order, proceed to try, or try the issue, &c., nor pay *A.* the 200*l.*, or any part thereof.

The defendant *C.* pleaded, that, after the making of the first order, and before the making of the second order, *B.* did, in pursuance and performance of the condition of the bond, *proceed to try* the issue, according to the course and practice of the court and the order, and that the jury were discharged from giving a verdict by the consent of *A.* and *B.*, without any default on the part of, and without the consent of, *C.* and *D.*, or either of them.

The defendant *D.* demurred generally to the declaration.

Held, that the declaration disclosed a sufficient breach, the meaning of the condition being that *B.* should actually cause the issue to be tried, and not being performed by the first proceeding to trial.

Held also, that the plea was bad, as raising an issue which was immaterial.

THIS was an action of debt on bond. The declaration stated that the defendants, theretofore, to wit, on the 17th of *February*, 1849, by their certain writing obligatory, sealed with their respective seals, and then shewn to the court, acknowledged themselves to be held and firmly bound unto the plaintiffs in the sum of 200*l.*, to be paid to the plaintiffs, which said writing obligatory was and is subject to a certain condition thereunder

written, whereby, after reciting that the Sheriff of Middlesex, under and by virtue of a certain writ of *fi. fa.*, issued out of Her Majesty's Court of Common Pleas at Westminster, in an action wherein the now plaintiffs were plaintiffs, and one *Jane Annie Morton* was defendant, caused the same to be levied upon certain goods and chattels in and about a certain house and premises at Camden Hill Villas, Kensington, in the said county; and that, the said goods and chattels being claimed by one *Richard Greville Slade*, the said sheriff, pursuant to the statutes in that behalf, had caused an application to be made to the said court for an interpleader order; and that Sir *C. Cresswell*, Knt., then being one of the justices of the said court, on the 14th of February, 1849, made an order in the said action, whereby, upon hearing the attorneys or agents for the said sheriff, and for the plaintiffs and the said *R. G. Slade*, it was ordered, that, upon payment of the sum of 200*l.* into court by the said *R. G. Slade* within a week from the date thereof, or upon his giving within the same time security to the satisfaction of one of the masters of the said court for the payment of the said amount, by the said *R. G. Slade*, according to the directions of any rule of court or judge's order to be made therein, and upon payment to the said sheriff, of the possession moneys from the date of the said order, the said sheriff should withdraw from the possession of the said goods and chattels; and whereby it was further ordered that the now plaintiffs and the said *R. G. Slade* should proceed to the trial of an issue in the said court, in which the said *R. G. Slade* should be plaintiff, and the now plaintiffs should be defendants; and that the question to be tried should be, whether, at the time of the said seizure the goods in the schedule to a certain bill of sale, dated the 3rd of November, 1848, were the property of the said *R. G.*

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Slade; and whereby it was further ordered that such issue should be prepared and delivered by the said *R. G. Slade* within a fortnight from the date of the said order, and be returned by the now plaintiffs within a fortnight, and should be tried at the sittings of nisi prius held after Easter Term, then next in, and for the county of Middlesex; and by which said condition, after further reciting that the said *R. G. Slade* had proposed the now defendants as security for the same sum of 200*l.* pursuant to the said order, and that H. M., Esq., one of the masters of the said court, had approved thereof,—it was conditioned, that, if upon the trial of the said issue it should be found that the said goods and chattels in the said order mentioned were, or any of them were, at the time of the said seizure, the property of the said *R. G. Slade,* or if the said *R. G. Slade* should *proceed to try* the said issue in due time according to the terms of the said order, or according to the course and practice of the said court, according to the said order or any further order of any judge to be made in that behalf, or if the said *R. G. Slade* should well and truly pay, or cause to be paid, to the now plaintiffs the sum of 200*l.*, or so much thereof as should be the value of the said goods and chattels, or such part of the same respectively as might be found not to be the property of the said *R. G. Slade,* then the said writing obligatory was to be void and of no force, otherwise to stand and remain in full force, vigour, and effect, as by the said writing obligatory and the said condition would more fully appear: Averment, that, after the making of the said writing obligatory, to wit, on the 21st of *March,* 1849, the said issue so as aforesaid ordered to be tried, was prepared and delivered by the said *R. G. Slade* to the now plaintiffs, and was by them then returned to the said *R. G. Slade,* pursuant to the said order of the said Sir *C. Cresswell*: That the said

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issue was ready to be tried at the sittings at nisi prius held after Easter Term next after the making of the said order, to wit, 1849, in and for the said county, but the same according to the course and practice of the said court was not tried, and the same was then, according to the course and practice of the said court, made a remanet until the sittings of nisi prius to be held after Trinity Term in that year, in and for the said county; and the said issue afterwards, to wit, on the 9th of May, 1849, came to be tried at the said last-mentioned sittings, and which sittings were then held before the Right Hon. Sir *Thomas Wilde*, Knt., then being the Chief Justice of the said court at Westminster, in the said county; and the jurors of the jury who were then and there chosen and sworn to try the said issue, were by the said Chief Justice, with the consent of the now plaintiffs and the said *R. G. Slade*, then and there discharged from giving, and did not give, any verdict thereon: That, afterwards, to wit, on the 30th of January, 1850, a further order was duly made in the said action, and in the matter of the said interpleader issue, by Sir *T. N. Talfourd*, Knt., being one of the said justices of the said court, by which order the said Sir *T. N. Talfourd*, did order that the said *R. G. Slade* should proceed to the trial of the said issue at the sittings of nisi prius to be held in and for the said county of Middlesex after Hilary Term, 1850; and that, in default thereof, the said *R. G. Slade's* claim to the said goods and chattels should be barred: That, although afterwards, and before the commencement of this suit, to wit, on the 1st of February, in the year last aforesaid, the sittings of nisi prius to be holden in and for the said county of Middlesex after the said last-mentioned term, were duly holden at Westminster, in and for the county of Middlesex, before the said Chief Justice, yet the said *R. G. Slade* did not nor would

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at the said last-mentioned sittings, or at any time after the making of the said last-mentioned order, *proceed to try*, or *try*, the said issue, according to the course and practice of the said court, according to the said last-mentioned order, or at all; and the same, by his default in that behalf, was not then, or at any other time, tried. That the said *R. G. Slade* did not nor would at any time well and truly pay or cause to be paid to the now plaintiffs the sum of 200*l.*, or any part thereof, — that sum during all the time aforesaid being the value of the said goods and chattels, the same being the goods in the schedule to the said bill of sale, and the same or any part thereof not being at the time of the said seizure the property of the said *R. G. Slade;* contrary to the said conditions of the said writing obligatory; and whereby the said writing obligatory had become forfeited; and thereby an action had accrued to the now plaintiffs, to demand and have of the defendants the sum of 200*l.*, being the sum &c. above demanded.

Plea of the defendant *Normansell.*

The defendant *Normansell* pleaded, that, after the making of the said writing obligatory, and before the making of the said order made by the said Hon. Sir *T. N. Talfourd*, that is to say, at the said sittings of nisi prius for the county of Middlesex held after Trinity Term, 1849, in the declaration mentioned, to wit, on the 19th of June, 1849, the said *R. G. Slade* did, in pursuance and performance of the said condition of the said writing obligatory, *proceed to try the said issue*, which, proceeding to try, was in due time according to the course and practice of the said court, according to the said order of the said Sir *C. Cresswell*, on which occasion the jurors of the jury chosen and sworn to try the said issue were then discharged from giving any verdict, as in the declaration mentioned, at the instance and by the consent of the now plaintiffs and the said *R. G. Slade*, without any default on the part of the

defendants or either of them or the said *R. G. Slade*, and without the consent of the defendants or either of them, although all the evidence, as well on the part of the said *R. G. Slade* as on the part of the now plaintiffs, was laid before the said jurors,—verification.

Demurrer by the defendant *Gray*.

The defendant *Gray*, after craving oyer of the deed, and setting out the condition (as in the declaration), demurred generally to the declaration.

Demurrer to *Normansell's* plea.

The plaintiff demurred specially to the plea of the defendant *Normansell*, the main ground of demurrer being, that it tendered an immaterial issue.

G. Denman, for the plaintiffs. The declaration is good, and the plea no answer. The substantial question is, what is the true construction of the condition of the bond. The condition is, that, if, upon the trial of the issue directed by the order of *Cresswell*, J., it should be found that the goods and chattels in the order mentioned, were, or any of them were, at the time of the seizure under the writ, the property of *Slade*, — or if *Slade* should proceed to try the said issue in due time according to the terms of the order, or according to the course and practice of the court, according to the said order or any further order of any judge to be made in that behalf,—or, if *Slade* should pay the plaintiffs 200*l.*, &c., the bond to be void, &c. Upon the fair construction of these words, it is submitted, the defendants have been guilty of a clear breach. It cannot be that each of these alternatives creates a separate condition; for, if that were so, the second would have no meaning that would afford any security at all to the plaintiffs. "Or" will in all cases be read "and," where otherwise the plain and manifest intention of the parties would be frustrated: *Green* v. *Wood*. (*a*) Assuming that there are three separate conditions, upon the first it is clear

(*a*) 7 *Q. B.* 178.

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the bond is in force; as to the third, the declaration avers non-payment of the 200*l.*: the only question remaining, is, whether the defendants have complied with the second condition, "if the said *R. G. Slade* should proceed to try the issue in due time, according to the order and the practice of the court." The plea of the defendant *Normansell* raises an immaterial issue: the condition is for something more than merely "proceeding to try" the issue. [*Wilde*, C. J. You contend it means "proceed *and* try?"] Precisely so. It was intended to secure a verdict of a jury. If so, the plea is clearly bad. *Slade* was, by the order of *Talfourd*, J., bound to try the issue at the sittings after last *Hilary Term:* and he did not do so. The plea, in effect, seeks to set up a sort of defence arising out of a giving of time to the principal. A parol agreement, however, to give time to the principal on a bond, is no defence to an action against a surety: see *Davy* v. *Prendergrass* (*a*) and the cases cited in Burge on Suretyship, pp. 212, 213.

Willes, contrà. The undertaking to "proceed to try" is satisfied by the party's *endeavouring to try.* This court so held in *Rizzi* v. *Foletti.* (*b*) [*Maule*, J. That proceeded upon the ground of the construction of the statute 14 *G.* 2. *c.* 17. s. 1.] The same construction must be put upon all instruments. [*Maule*, J. Proceeding to try here must mean doing all the party can to get to trial. The first branch of the condition *Slade* has not complied with, because he has not obtained a verdict: he has equally made default as to the second, because he has not proceeded according to my Brother *Talfourd's* order; and he has made default as to the third, because he has not paid the money. Therefore,

(*a*) 5 *B. & Ald.* 187. (*b*) *Antè*, Vol. V. p. 852.

the bond is not void.] The not proceeding to try according to the order of *Talfourd*, J., was not a breach of the condition; for, the condition had been performed before the date of that order. The case does not fall within the principle of *Davey* v. *Prendergrass*, but rather within the exceptions in Com. Dig. *Condition* (L. 4.) and (L. 6.), where it is said,—" The non-performance of a condition may be excused by the default of the feoffee or obligee; as, if the feoffor or obligor makes a legal tender of the money to the feoffee or obligee at the day and place appointed, and he refuses to accept it." " So, the performance of a condition shall be excused by the obstruction of the obligee: as, if a condition be, to build a house, and he, or another by his order, hinders his coming upon the land, or say that it shall not be built, or interrupts the performance. So, if a condition be that the lessee shall leave a house in good plight, and fire out of the chimney of the lessor next to it consumes it. So, if there be a recognizance to the King for appearance, and the party is imprisoned by A. and B., who act by lawful authority of the King." Here, the plaintiff consented to the discharge of the jury. [*Maule*, J. What is material here is, the consenting and agreeing: that is an agreeing by parol to discharge the party from a bond!] An act in pais by the obligee may discharge a bond: of this many instances are given by Chief Baron Comyns. [*Maule*, J. If the condition here means that *Slade* was to perform the second part, he was bound to proceed to try, notwithstanding the former consent of the plaintiffs to discharge the jury.]

Denman was heard in reply.

WILDE, C. J. This bond, like every other written instrument, must be construed with reference to the in-

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tention apparent on the face of it, so far as the words will admit of it. Here I think it is sufficiently apparent what the parties meant, viz. to bring to a judicial decision a certain claim. The first branch of the condition is, that the bond shall be void, "if upon the trial of the issue directed by the order of *Cresswell*, J., it should be found that the goods and chattels in the order mentioned were, or any of them were, at the time of the seizure under the fi. fa., the property of *Slade*,"—plainly shewing the object of the bond to be, to have a judicial inquiry as to a particular fact. It then proceeds,—"or, if the said *R. G. Slade* should *proceed to try* the said issue in due time according to the terms of the said order, or according to the course and practice of the court," &c. That palpably shews the intention of the parties that a trial should actually take place; and care is taken to guard against a failure in that respect. No doubt there might arise circumstances which might operate a dispensation; but nothing is shewn to have taken place which could have prevented *Slade's* causing the issue to be tried. The terms of the order of my brother *Talfourd* are, "that *Slade* should proceed to the trial of the said issue at the sittings of *nisi prius* to be held in and for the county of Middlesex after Hilary Term, 1850, and that, in default thereof, his claim to the said goods and chattels should be barred." There seems to me to be no reasonable doubt as to the words or meaning of the condition. I think there has been a failure on the part of *Slade* to perform the condition, in not proceeding to try, that is, causing the issue to be tried, and that he was not prevented from so doing by the circumstances of the jury having been discharged. The declaration therefore is good, and is not answered by the plea.

MAULE, J. I also think the plaintiffs are entitled to

the judgment of the court. It appears upon the record that *Slade* has failed to do that which the bond was given to compel him to do. The bond was given under an interpleader order, as a condition upon which the goods were handed over to the claimant,—among other things, to secure the proceeding to a trial of the issue. The obligation was to be void if *Slade* should do any one of three things,—first, if he should prove upon the trial of the issue that the goods and chattels in the order mentioned were, or any of them were, at the time of the seizure, his property. That he certainly did not do. In the third place, the bond was to be void if *Slade* should well and truly pay or cause to be paid to the plaintiffs 200*l.*, or so much thereof as should be the value of the goods and chattels or such part thereof respectively as might be found not to be his property. That he has not done. The second branch of the condition (which it is said has been performed) is, that the bond should be void, "if *Slade* should *proceed to try* the said issue in due time according to the terms of the said order, or according to the course and practice of the court, according to the said order, or any further order of any judge to be made in that behalf." Now, the obvious meaning of that, is, that the obligor should proceed to the trial of the issue according to all the orders which should from time to time regulate the proceedings. He was to proceed according to each of these things at the time when each was applicable. That he failed to do, inasmuch as after the agreement to withdraw a juror there was an order of my Brother *Talfourd* directing him to proceed to trial at a particular sitting; and this he omitted to do. It is unnecessary to consider the case of *Davey* v. *Prendergrass.* Discarding all considerations of that kind, this plea affords no defence. The matter relied on here, is, an agreement that the obligor shall proceed to try the issue, according

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to the course and practice of the court. The consent to withdraw a juror did not relieve him from proceeding to trial at a subsequent time. The parties contemplated a proceeding to trial after a postponement by consent, as well as before. There is, therefore, a general failure to perform any part of the condition.

CRESSWELL, J. I am entirely of the same opinion. The words "according to the said order, or any further order of any judge to be made in that behalf," were evidently inserted to meet the case of a failure to try on the first attempt.

TALFOURD, J. I am of the same opinion. The alternative words in the condition are merely descriptive of the various modes in which *Slade* might perform the condition of the bond. Not having performed either alternative, the bond is clearly forfeited.

Judgment for the plaintiffs.

Ex Parte MARY ANNE THOMAS.

May 30.

Under the Joint-Stock Companies Winding-up Act, 1848, the master made an order for placing an executrix on the list of contributories in respect of shares in the undertaking held by her testator, and directing her to pay 1469*l.* 15*s.* 7*d.* out of the assets of the testator, if she had so much in her hands to be administered. This order having been registered as a charge against *the executrix*, as well as against the testator, — an application to the court to alter or vacate the entry was refused.

THE affairs of the North of *England* Joint-Stock Banking Company being in course of winding up under The Joint-Stock Companies Winding-up Act, 1848, 11 & 12 *Vict.* c. 45., *Mary Anne Thomas* was brought before the master as executrix of one *John Ness*, and on the 24th *February* last the master made

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an order by which she was placed on the list of contributories, as such executrix, in respect of forty-eight shares in the undertaking, held by *Ness*, and was ordered to pay a sum of 1469*l.* 15*s.* 7*d.* out of the assets of her testator, if she had so much in her hands to be administered. On the 7th of *May*, a notice was served upon her, that the official managers had registered the order so made by the master, in the registry of judgments. Search was accordingly made in the office, and the order was found to be registered as a charge *against her*, and also against *John Ness*.

Willes, on behalf of Mrs. *Thomas*, moved for a rule calling upon the official managers to shew cause why the entry on the register should not be vacated or amended, inasmuch as they had no right to register the order as a charge apparently against *her* estate. [*Maule*, J. Suppose *John Ness* had died possessed of chattels real, would not this entry have been proper?] It is submitted it would not. The proceedings would have been under the 1 & 2 *Vict. c.* 110. In 2 *Wms. Saund.* 9 *c*, *n.* (*e*), it is said, "If a scire facias be brought on the judgment against the executor, he may give in evidence, under a plea of plene administravit, the payment of other debts before action brought, which exhausted all the assets; and it is not necessary for him to allege in his plea that that there was no docket: *Hall* v. *Tapper.* (*a*) And, where a judgment has not been docketed according to the statute, the circumstance that *actual notice* of it has been received by the executor or administrator, will not entitle it to any priority or preference in administration. The statute does not require a judgment against the *executor* to be docketed:

(*a*) 3 *B. & Ad.* 655.

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Ganut v. *Taylor*. (*a*) By the statute 2 *Vict. c.* 11. *s.* 1. no judgment shall be hereafter docketed under the statute 4 & 5 *W. & M. c.* 20. But by the 1 & 2 *Vict. c.* 110. *s.* 19. and 2 *Vict. c.* 11. *ss.* 2. 4. judgments shall be registered in the modes prescribed by those statutes. It may questioned whether these enactments will not be attended with a serious consequence (perhaps overlooked by the legislature) with reference to the subject now under discussion; for, it may be contended that the effect of them is, that a judgment recovered subsequently to the passing of the acts will be entitled to precedence, as at common law, in the administration of assets by an executor or administrator notwithstanding it is neither registered as prescribed by the statutes of *Victoria*, nor docketed as required by the statute of 4 & 5 *W. & M. c.* 20.; because it is no longer possible to docket the judgment under the statute of *W. & M.*; and the only penalty imposed by the statutes of *Victoria* for neglecting to register it, is, that it shall not affect any land, tenements, and hereditaments. The statutes omit to enact (as they ought to have done, in order to conform with the statute of *W. & M.*) that a judgment not registered shall not have any precedence against executors or administrators in the administration of their testator's or intestate's effects."

MAULE, J. (*b*) This order is registered, in order to get a chance of precedence against other claimants. The order binds the assets: and there is no prohibition in the act against registering it. This notion of seeking to vacate the registry is a thing quite out of the contemplation of the legislature.

The rest of the court concurring,

Rule refused.

(*a*) 3 *M. & G.* 886., 3 *Scott, N. R.* 700.

(*b*) *Wilde*, C.J., was absent.

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June 5.

It is not necessary, in pleading a deed of arrangement under the Bankrupt Law Consolidation Act, 1849, (12 & 13 *Vict.*, *c.* 106.), *ss.* 224, 225, to set out the names of the creditors who have executed the deed, or the dates or amounts of their debts.

Nor is it necessary to set out all the trusts, conditions, and provisions contained in the deed.

Where the execution of a deed is alleged in a pleading to have taken place upon two different days, the court will reject that which from other averments in the plea appears to be an erroneous date.

In such a case, an allegation that "the defendant was a trader, and indebted to divers persons in divers sums, and was unable to pay the same in full," and thereupon executed the deed of arrangement, is (on general demurrer at least,) a sufficient allegation that he had suspended payment.

And *semble* that the execution of the deed was in itself a "suspension of payment," within the meaning of *ss.* 211 and 225.

Held, that such a plea was properly pleaded as a release, and to the *further* maintenance of the action.

ASSUMPSIT on a bill of exchange for 45*l.* 16*s.* 2*d.*, at four months' date, drawn by the plaintiffs upon and accepted by the defendant; with counts for goods sold and delivered, work and materials, and money found due upon an account stated.

The defendant pleaded,—first, to the first count, and to the residue of the declaration so far as it related to the sum of 45*l.* 16*s.* 2*d.*, parcel of the moneys and causes of action in the said residue mentioned,—to the further maintenance of the action,—that the bill in the first count mentioned was accepted by the defendant, and taken by the plaintiffs, before the making of the indenture thereinafter mentioned, for and on account of the said sum of 45*l.* 16*s.* 2*d.*, parcel &c., and that the said sum, parcel &c., and the amount of the said bill, are the same sum: that, before and at the time of making the deed thereinafter mentioned, and for six months and upwards next immediately before the suspension of payment thereinafter mentioned, the defendant was a trader liable to become bankrupt under the bankrupt laws, and within the meaning of the statute thereinafter mentioned: that, before and at the time of making the

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said indenture, he was indebted to the parties of the second part to the deed thereinafter mentioned, and to divers other persons, in divers sums, and was and would be unable to pay the same in full, and the defendant, before the time of making the said indenture, to wit, after the passing and coming into operation of the statute thereinafter mentioned, to wit, on the 25th of *October*, 1849, as such trader, [suspended payment, and thereby, by deed of arrangement*] made after the passing and coming into operation of the Bankrupt Law Consolidation Act, 1849 (12 & 13 *Vict. c.* 106), and after the 11th of *October*, 1849, to wit, on the 7th of *November* in the year aforesaid,—which indenture, sealed with the seal of the defendant, and sealed as thereinafter was mentioned, the defendant brought into court,—and made between the defendant of the first part, *John Skitt*, *James Willes*, and *Joanna Priddy* of the second part, and the several other persons whose names and seals should be thereunto subscribed and affixed by themselves or their agents (being creditors of the defendant) of the third part,—after reciting (inter alia) that the defendant was possessed of certain property (specified in the schedule), and that he had agreed to assign all his estate, &c., to the said parties of the second part, the said defendant did bargain, &c., unto the said *John Skitt*, *James Willes*, and *Joanna Priddy*, their executors, &c., all his leasehold hereditaments, with the appurtenances, and the goodwill of the trade or business of a beer-shop keeper then carried on by the defendant, and his stock in trade, &c., and all his personal estate, &c., to hold the same to the said *John Skitt*, *James Willes*, and *Joanna Priddy*, subject to certain charges and the covenants and agreements therein mentioned, upon trust (subject to certain provisions and stipulations therein mentioned) to pay certain charges and incumbrances, and pay and retain certain costs, &c., and upon further

*These words were omitted.

trust to apply the residue of the trust moneys which should remain after satisfying the trusts and purposes aforesaid, from time to time when and as received, towards payment of the several debts and sums of money then due from the defendant to the several persons parties thereto of the second and third parts, without any preference, and rateably, with interest, until the whole of the said debts should be fully paid, or the said trust moneys should be exhausted; and, in case there should be any surplus, upon trust to pay the same unto the defendant, his executors, &c., for his or their own benefit: and the defendant covenanted with the said *John Skitt*, *James Willes*, and *Joanna Priddy*, that the defendant, from time to time, upon every reasonable request or notice to him by the trustees or trustee for the time being, would assist in carrying on the said business, in making up his accounts, and in the settling of any disputes which might arise concerning any of his debts, and also in ascertaining and getting in the same: and, by the said deed, in consideration of the assignment therein made, and other the premises therein aforesaid, the several persons parties thereto of the second and third parts, did for themselves severally, and for their several executors, &c., but not the one for the other or others, covenant, promise, and agree with and to the defendant, that, in case the defendant should in all respects perform the covenants and agreements thereinbefore contained, and on his part to be done and performed, they, the said creditors, parties thereto of the second and third parts, nor their executors, &c., should not in any manner whatsoever sue, arrest, implead, or prosecute him, the said defendant, his executors or administrators, or issue any execution against his or their goods, &c., for, or upon, or on account of, any debt or money then due or owing unto them, or any of them; and, in case any of the said creditors, parties to the said

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deed, their executors, &c., should sue, arrest, implead, or prosecute him, the defendant, his executors, &c., for any such debt or sum, that then the said deed should be a sufficient release and discharge to all intents and purposes, at law and in equity, to and for the defendant, his executors and administrators, and he and they should be and were thereby acquitted, released, and discharged against them, the said creditors, parties thereto of the second and third parts, and every of them, their executors, &c., who should sue, arrest, imprison, implead, or prosecute the defendant, his executors or administrators, contrary to the true intent and meaning of the said deed, and as such should and might be pleaded by him, the defendant, his executors or administrators: that the said deed contained certain other provisions, &c., therein set forth; that, before the commencement of this suit, to wit, on the said 7th of November, 1849, to wit, at the time of the making of the said deed, the same was sealed by the defendant, and divers, to wit, one hundred, of the creditors of the defendant, by themselves, signed the said deed, and subscribed their names and affixed their seals thereto, and divers, to wit, one hundred, others of the said creditors, by their agents respectively, signed the said deed, and subscribed their names and affixed their seals thereto: that the said deed was a deed of arrangement between the defendant and his creditors, within the meaning of the provisions of the Bankrupt Law Consolidation Act, 1849, with respect to arrangements by deed; and that the said creditors by whom and on behalf of whom the said deed was signed as aforesaid, were more than six sevenths, to wit, nine tenths, in number and value of the creditors of the defendant within the meaning of the said provisions of the said act whose debts amounted within the meaning of the said provisions to the sum of 10*l.* and upwards, accounting every creditor as a creditor in

value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the creditors by whom and on behalf of whom their names were subscribed and seals affixed, were more than six sevenths in number and value of the creditors of the defendant within the meaning of the said provisions of the said act, whose debts amounted, within the meaning of the said provisions, to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the plaintiffs were at the time of making the said deed creditors of the defendant in respect of the said causes of action in the introductory part of this plea mentioned, within the meaning of the said provisions of the said act; and that, before and at the said time of making the said deed, the amount in the introductory part of the plea mentioned was a debt then due from the defendant to the plaintiffs within the meaning of the said deed; and that, after the said suspension of payment, and after the said deed had been so signed, and the names of such majority as aforesaid of creditors had been so subscribed and seals so affixed, to wit, on the 2nd of *January*, 1850, and before the presentation of the petition hereinafter mentioned, the plaintiffs had notice from the defendant of the said suspension of payment, and of the said deed of arrangement, and were then requested by the defendant to sign and execute the same, and the plaintiffs then might and could (if they would) have signed and executed the same as parties of the second part; and that the bill in the first count mentioned was held by the plaintiff at the

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time of the making of the said deed, and thence to the commencement of this suit, and at the time of giving them the said notice, and requesting them to sign and execute as aforesaid; and that *for six months next immediately preceding his said suspension of payment*, the defendant carried on business, to wit, as such trader, within the district of the court of Bankruptcy in *London*; and that, after he had suspended payment as aforesaid, and after the making, signing, and subscribing names and affixing seals to the said deed as aforesaid, he, the defendant, to wit, on the 8th of *January*, 1850, in pursuance of the said act, presented his petition to the said court of Bankruptcy in *London*, praying the said court to grant to him, the defendant, an order or certificate certifying that the said deed of arrangement had been duly signed by or on behalf of six sevenths in number and value of the creditors of the defendant whose debts amounted to 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him: That, afterwards, to wit, on the 24th of *January*, in the year aforesaid, application was made by the defendant to the said court for an order or certificate, in pursuance of the said prayer of the said petition, and that the plaintiffs, more than fourteen days before the making of the said application, had notice from the defendant that the petition had been presented, and of the said intended application, and of the time when the same would be and was made; and that thereupon, on and after the said application to the said court, and within three months from the time at which the plaintiff had notice from the defendant of his said suspension of payment, and of such deed of arrangement, to wit, on &c., the

said court, in pursuance of the said petition, and of the said act, and then having jurisdiction in and over the matters of the said application, did make and give to the defendant a certificate, whereby the said court did certify that the said deed of arrangement had been duly signed by or on behalf of six sevenths in number and value of the creditors of the defendant, whose debts amounted, within the meaning of the said provisions, to 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and all other such available securities or liens from the defendant, appeared to be the balance due to him. The plea then, after a general averment of performance by the defendant of the covenants on his part, proceeded to aver, that the said parties of the second part on and at all times after the making of the said deed assented to the same, and acted as such trustees; that thereby and thereupon the said deed became and was as effectual and obligatory upon the plaintiffs as if they had duly signed the same; that the said deed and certificate still remained in full force; and that, by reason of the matter aforesaid, and of suing the defendant in this action, the said defendant, theretofore, and after the commencement of this action, to wit, on &c., became and was released and discharged from the said causes of action in the introductory part of the plea mentioned, and from the plaintiffs' right to sue for the same,—verification.

Special demurrer.

To this plea the plaintiffs demurred specially, assigning for causes, amongst others, — that the plea is uncertain and insufficient, in that it states that the defendant was indebted to the parties of the second part to the deed therein mentioned, and to divers other persons, in divers sums respectively, without mentioning or giving their Christian or surnames, or stating how many they were, or offering any excuse whatever for such omis-

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sions, and without stating or mentioning the amount of the respective sums in which the defendant was so indebted, — that the plea is uncertain and insufficient, in that it states that the said deed contained certain other provisos, declarations, and agreements in the said deed set forth, and it is nowhere stated in the said plea what those provisos, declarations, or agreements, or any of them, are, and that the same should have been fully set forth in the plea, that the plaintiffs might have an opportunity of traversing or pleading to them, — that the plea is further uncertain and insufficient, in that it is nowhere stated in the said plea what were the respective Christian and surnames of the creditors who executed the said deed themselves, or of the other creditors who executed the said deed by their agents, and also in that the Christian and surnames of such agents ought to have been set forth in the plea, or an excuse alleged; that the plea is also insufficient, for, that the deed ought to have been set forth in the plea, or pleaded according to its legal effect, — that it should have been a plea in bar of the action generally, and not to the further maintenance, — and that it is argumentative, and sets out conclusions of law.

The defendant joined in demurrer.

Channell, Serjt. (with whom was *Unthank*), in support of the demurrer. The deed relied on in the plea is sought to be brought within the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c.* 106, which enacts "that any deed or memorandum of arrangement, now or hereafter entered into between any such trader and his creditors, and signed by, or on behalf of, six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management,

and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be, or liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy; provided, always, that every creditor shall be accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section enacts "that no such deed or memorandum of agreement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement unless such trader shall, within such time, obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceeding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid, shall be bound thereby." Section 226 enacts, "that, when the trustees or inspector under any such

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deed or memorandum of arrangement, or, if there shall be no such trustee or inspector, when any two of the creditors shall be satisfied that six sevenths in number and value of the creditors whose debts amount to 10*l.* and upwards, have signed such deed or merorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the court in writing; and such certificate shall be filed with the registrar of the court, and shall thereupon be *primâ facie* evidence in all courts of law and equity that such deed or memorandum of arrangement has been so signed." And the 227th section enacts "that every such certificate as last aforesaid, shall have appended thereto a full account of the debts of such trader, together with the names, residences, and occupations of his creditors, and shall be accompanied by an affidavit by such trader verifying the same; and any omission in such account, or the insertion therein of any debt not really existing, or of any larger amount of debt than that really existing, and which shall appear to the court to have been made through the culpable negligence or fraud of such trader, with intent to defraud any of his creditors, shall deprive him of the benefit of the provisions of this act with respect to arrangements by deed, and of the discharge proposed in any such deed or memorandum of arrangement: provided always, that any omission, insertion, or incorrectness in such account, which shall not have been made through such culpable negligence or fraud as aforesaid, shall not defeat or otherwise affect such deed or memorandum of arrangement." [*Wilde*, C. J. Is there any clause in the act making the deed pleadable in bar?] None. This is a case where it is sought to bind a party by a deed which he has not executed; the court will, therefore, look at it with strictness. The creditors are only bound by a deed framed and executed with a due regard to the provisions of the act. The plaintiffs are

entitled to have all the facts accurately and affirmatively stated. As this could only be binding on the plaintiffs in the event of a certain proportion in number and value of the creditors executing it, the defendant was bound to state the names of the several creditors by whom it was signed, and the amounts of their respective debts. The general rule of pleading applicable to this case is thus stated in *Stephen on Pleading*, 5th edit. p. 338, Rule 4,—"The pleadings must specify the names of persons,"—"The rule relates to persons *not* parties to the suit, of whom mention is made in the the pleading. The names of such persons, viz. the Christian name and surname, or name of dignity, must in general be given, but, if not within the knowledge of the party pleading, an allegation to that effect should be made, and such allegation will excuse the omission of name." (*a*) It is true the deed shews who are the parties who have executed it: but the plaintiffs are entitled to know who the several persons are to whom the defendant is indebted, and the amount of their respective debts, in order to see that the parties who have executed the deed are in reality the proportion in number and amount required by the statute to give force and validity to the arrangement. [*Maule*, J. There is an averment that the persons who executed the deed are in truth six sevenths in number and amount of the creditors.] True: but this point arises on special demurrer; and the plaintiffs have a right to have all the names set out, to give him the means of making inquiry. A distinction is taken between setting out a deed or other written instrument by description, and stating a transaction be-

(*a*) *Buckley* v. *Rice Thomas*, *Plowd.* 128. *a.*; *Rowe* v. *Roach*, 1 *M.* & *Selw.* 304.; *Ball* v. *Gordon*, 9 *M.* & *W.* 345.; *Tigar* v. *Gordon*, 9 *M.* & *W.* 347.

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tween the parties on which the action turns. This is pointed out in *Levy* v. *Webb* and *Gatty* v. *Field* (*a*), where Lord *Denman*, in delivering the opinion of the court upon this point, says,—" The question reserved for consideration in the first of these cases turned upon the insertion of initials only, instead of the full Christian names; in the second, on the omission of Christian names, and substitution of 'Mr.' And we are of opinion, that, when such omission or substitution is made, not in the description of some written instrument, but in the statement of a transaction between the parties on which the action turns, it is good ground of special demurrer. We must presume that every person has a Christian name; and it ought to be stated, or reason assigned for the omission." [*Talfourd*, J. The last case upon the subject is, *Kinnersley* v. *Knott*. (*b*) *Maule*, J. This rather comes within the 6th division of Rule VII. in *Stephen* (5th edit., p. 392), — " a general mode of pleading is allowed where great prolixity is thereby avoided."] In that case, the plea should have so alleged. The next objection is, that it is not positively alleged in the plea that the defendant made the indenture. [*Maule*, J. Certain words are omitted in copying the demurrer-books, which seems to leave the matter entirely at large. But, is not that cured by the subsequent allegations?] It is pointed out as ground of special demurrer. If the plea does state that the defendant made the deed, then it is open to a further objection, viz. that it is repugnant and insensible, inasmuch as two dates are mentioned. Then, the provisions of the deed are not well stated: there is a primary trust which ought to have been set out. [*Maule*, J. It does not follow that they are charges to which the assignees are subject. *Wilde*, C. J. There is nothing in the

(*a*) 9 *Q. B.* 431. (*b*) *Antè*, Vol. VII. p. 180.

act to prescribe what shall be the precise form of the deed. The six sevenths are to decide it. Can it be material to set out all the trusts? See the inconvenience, the prolixity it would lead to. There might be trusts to carry on the trade, and a variety of other things.] The plea goes on to say, that "the said deed contained certain other provisos, &c., therein set forth." These might be material with reference to the defendant's covenants, and ought to have been set out. The deed does not operate as an absolute release of the debt, but only conditional on the performance of the defendant's covenants. Whether or not the defendant has performed his covenants, may depend very much on the trusts which are not setout. The plaintiffs, therefore, have a right to have them placed on the record. If this deed operated as a release, when did it become so? [*Maule* J. At once.] The plaintiffs do not covenant not to sue. This matter was very much considered in the Exchequer Chamber, in a case of *Ford* v. *Beech* (*a*). [*Maule*, J. And in a more recent case in this court, of *Gibbons* v. *Vouillon* (*b*). The effect of the deed and of the statute is, that the deed enures as a release, provided the defendant has performed all his covenants, and complied with all the conditions. It is a sort of penalty,—a forfeiture of the debt.] If so, this ought to have been pleaded in bar, and not to the further maintenance of the action. [*Maule*, J. The deed enures as a release at the election of the debtor: and is therefore properly pleadable in bar of the further maintenance of the action.] There is no averment of any suspension of payment by the defendant in point of fact, but merely that the defendant was indebted to certain persons in divers sums, which he was unable to pay in

(*a*) 11 *Q. B.* 852. (*b*) *Antè*, Vol. VIII. p. 483.

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full. In the absence of a suspension in fact, the court of Bankruptcy had no jurisdiction.

Aspland (with whom was *Byles*, Serjt.), *contrà*. The plea in question is substantially a good plea under the 224th and 225th sections of the statute. By the first of those sections, the deed is made binding upon the plaintiffs notwithstanding its non-execution by them, provided the defendant has performed all that it was incumbent on him to perform. The plea sufficiently shews that there was a suspension of payment by the defendant, and that the plaintiffs had notice of it. [*Wilde*, C. J. The plea states that the plaintiffs had notice from the defendant of *the said* suspension of payment. If there is no previous mention of suspension of payment, must we not reject the whole?] The plea, in the previous part, states that the defendant was insolvent, and unable to pay his debts. [*Wilde*, C. J. The word "suspension" has a very distinct meaning. The statute speaks of the fact.] It is to be observed that this is not pointed out as ground of special demurrer. The question, therefore, is, whether this general allegation is not sufficient. Besides, it is clearly involved in the allegation of notice. Further, the court of Bankruptcy has acted: and this court will assume that that court has done its duty in this respect. The question as to the release has been already disposed of by the court. Then, as to the matters of form. It is said there is a repugnancy, inasmuch as the deed is stated to have been made on two different days. As to the day first mentioned, however, it is insensible, and the court will reject it. And in a subsequent part of the plea there is a distinct averment that the deed was made on the 7th of November, 1849. In *Stephen on Pleading*, p. 404, it is laid down, that "No greater particularity is required than the nature of the thing

value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the creditors by whom and on behalf of whom their names were subscribed and seals affixed, were more than six sevenths in number and value of the creditors of the defendant within the meaning of the said provisions of the said act, whose debts amounted, within the meaning of the said provisions, to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him; and that the plaintiffs were at the time of making the said deed creditors of the defendant in respect of the said causes of action in the introductory part of this plea mentioned, within the meaning of the said provisions of the said act; and that, before and at the said time of making the said deed, the amount in the introductory part of the plea mentioned was a debt then due from the defendant to the plaintiffs within the meaning of the said deed; and that, after the said suspension of payment, and after the said deed had been so signed, and the names of such majority as aforesaid of creditors had been so subscribed and seals so affixed, to wit, on the 2nd of *January*, 1850, and before the presentation of the petition hereinafter mentioned, the plaintiffs had notice from the defendant of the said suspension of payment, and of the said deed of arrangement, and were then requested by the defendant to sign and execute the same, and the plaintiffs then might and could (if they would) have signed and executed the same as parties of the second part; and that the bill in the first count mentioned was held by the plaintiff at the

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in *Smith* v. *Doe* d. *The Earl of Jersey.* (*a*) Under this act, there is a special reason why the general averment should be held sufficient. The 226th section requires the trustee or inspector, or two creditors, to certify that the deed has been signed by six sevenths in number and value of the creditors whose debts amount to 10*l.* and upwards. [*Cresswell,* J. And s. 237 requires an account of the debts of the trader to be appended to the certificate, together with the names, residences, and occupations of his creditors.] That section gives the creditors ample means of ascertaining that which it is contended should have appeared on the face of this plea. Perfect information could not be furnished by the plea: some of the creditors execute by power of attorney, which would not be in the custody or power of the defendant: *Hibbert* v. *Knight.* (*b*) The plea alleges that the deed was subscribed by divers, *to wit,* two hundred of the defendant's creditors: the *videlicet* may be rejected,—*Nash* v. *Brown* (*c*); and then the plea shews the impracticability of setting out all the names. [*Cresswell,* J. The numbers are not material.] A date may be assumed to be material upon demurrer, when, if truly stated, it would support the pleading,—*Ryalls* v. *Bramall.* (*d*) [*Wilde,* C. J. In that case you would be put to proof of the precise number.] The plaintiffs are under no hardship; for, if they had taken the right course, they might have discontinued without costs: *Wollen* v. *Smith.* (*e*)

Channell, Serjt., in reply. It is important that the plaintiffs should find upon the face of the plea a distinct and positive allegation of an actual suspension of pay-

(*a*) Cited 11 *Price,* 193.
(*b*) 12 *Jurist,* 162.
(*c*) *Antè,* Vol. VI. p. 584., 6 *D. & L.* 329.
(*d*) 5 *D. & L.* 753.
(*e*) 9 *Ad. & E.* 505.

said court, in pursuance of the said petition, and of the said act, and then having jurisdiction in and over the matters of the said application, did make and give to the defendant a certificate, whereby the said court did certify that the said deed of arrangement had been duly signed by or on behalf of six sevenths in number and value of the creditors of the defendant, whose debts amounted, within the meaning of the said provisions, to 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and all other such available securities or liens from the defendant, appeared to be the balance due to him. The plea then, after a general averment of performance by the defendant of the covenants on his part, proceeded to aver, that the said parties of the second part on and at all times after the making of the said deed assented to the same, and acted as such trustees; that thereby and thereupon the said deed became and was as effectual and obligatory upon the plaintiffs as if they had duly signed the same; that the said deed and certificate still remained in full force; and that, by reason of the matter aforesaid, and of suing the defendant in this action, the said defendant, theretofore, and after the commencement of this action, to wit, on &c., became and was released and discharged from the said causes of action in the introductory part of the plea mentioned, and from the plaintiffs' right to sue for the same,—verification.

Special demurrer.

To this plea the plaintiffs demurred specially, assigning for causes, amongst others, — that the plea is uncertain and insufficient, in that it states that the defendant was indebted to the parties of the second part to the deed therein mentioned, and to divers other persons, in divers sums respectively, without mentioning or giving their Christian or surnames, or stating how many they were, or offering any excuse whatever for such omis-

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sions, and without stating or mentioning the amount of the respective sums in which the defendant was so indebted, — that the plea is uncertain and insufficient, in that it states that the said deed contained certain other provisos, declarations, and agreements in the said deed set forth, and it is nowhere stated in the said plea what those provisos, declarations, or agreements, or any of them, are, and that the same should have been fully set forth in the plea, that the plaintiffs might have an opportunity of traversing or pleading to them, — that the plea is further uncertain and insufficient, in that it is nowhere stated in the said plea what were the respective Christian and surnames of the creditors who executed the said deed themselves, or of the other creditors who executed the said deed by their agents, and also in that the Christian and surnames of such agents ought to have been set forth in the plea, or an excuse alleged; that the plea is also insufficient, for, that the deed ought to have been set forth in the plea, or pleaded according to its legal effect, — that it should have been a plea in bar of the action generally, and not to the further maintenance, — and that it is argumentative, and sets out conclusions of law.

The defendant joined in demurrer.

Channell, Serjt. (with whom was *Unthank*), in support of the demurrer. The deed relied on in the plea is sought to be brought within the 224th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c.* 106, which enacts "that any deed or memorandum of arrangement, now or hereafter entered into between any such trader and his creditors, and signed by, or on behalf of, six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management,

and mode of winding up his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement, as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be, or liable to be, disturbed or impeached by reason of any prior or subsequent act of bankruptcy; provided, always, that every creditor shall be accounted a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him." The 225th section enacts "that no such deed or memorandum of agreement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement unless such trader shall, within such time, obtain from the court an order or certificate of the said court, declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the court within the district of which the trader shall have resided or carried on business for six months next immediately preceeding his suspension of payment, to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid, shall be bound thereby." Section 226 enacts, "that, when the trustees or inspector under any such

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the creditors the largest possible discretion in that respect. It would be absolutely impossible to frame a deed with all the provisos and stipulations necessary for the winding up of an estate. To require that would go far to frustrate and destroy the spirit and intention of the act. The same remarks will apply to the argument as to the primary trusts.

The objections to the form of the plea were sufficiently answered in the course of the argument.

Whether the deed has the effect of a release of the estate, as well as of the person of the debtor, it is unnecessary to inquire. It clearly operates a release of the debtor, and may be so pleaded; and the plaintiffs are in the same situation as if they had actually executed it. For these reasons I am of opinion that the defendant is entitled to the judgment of the court upon this demurrer.

MAULE, J. I am of the same opinion. The plea is certainly in some respects defective: but, upon the whole, I think its defects are not such as to entitle the plaintiffs to succeed upon this demurrer. There is much weight in the objection as to the omission of the words; and, though I incline to think that omission is remedied by what may be picked up in other parts of the plea, I should not be surprised if another court should hold the form defective. As to the non-enumeration of the names of the creditors, I think the case comes within that series of cases relating to the avoidance of prolixity. If the number of persons constituting a class be small, they might very well be enumerated; but the courts have said, that, as they probably might be numerous, it is enough to describe them in pleading by their general description, in order to avoid prolixity. The 225th section of the statute speaks of suspension of payment as of a thing of which the creditor is to

have notice; and then it shall be lawful for the court to make an order or certificate declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of the requisite number of creditors. The suspension of payment is not introduced there as a new thing, though the expression is introduced for the first time: the statute speaks of it as of something which the framers consider as having been spoken of before in the 224th section. The circumstances mentioned in s. 224 do, in my opinion, constitute a suspension of payment within the meaning of s. 225. The 224th section speaks of notice to the creditors of the suspension of payment of *such* trader, and of the execution by him of a deed or memorandum of arrangement. The earlier provisions of the statute (s. 211) shew that this means a trader who is "unable to meet his engagements with his creditors, and is desirous of laying the state of his affairs before them." I therefore think the suspension of payment is sufficiently averred in this plea. When a trader who is unable to meet his engagements with his creditors enters into an arrangement of this kind, I think that constitutes a "suspension of payment" within the 225th section. That being so, the objection to the plea on that ground also fails. As to the non-allegation of the trusts of the deed, the answer has been given by the Lord Chief Justice. Though not parties executing the deed, the provisions of the statute having been complied with, the deed is as binding upon the defendants as if they had actually signed it. In effect the six sevenths are constituted attorneys for the non-assenting seventh. These facts being alleged shew that the deed is the plaintiffs' deed. The 224th section of the statute makes a deed executed in the manner prescribed, subject to the conditions after mentioned, "as effectual and obligatory in all respects upon all the creditors who shall not have

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signed such deed or memorandum of arrangement, as if they had duly signed the same." If the trader does what the act of parliament and the covenants in the deed require him to do, and any creditor shall afterwards sue him in respect of a debt or demand included in the account annexed to the certificate, according to the case of *Gibbons* v. *Vouillon* (*a*), the deed shall operate as a release. I therefore think the plea is sufficient. If the deed contain any provisions inconsistent with that construction, that might be shewn by way of replication. With regard to the plea being pleaded to the further maintenance of the action, I have already sufficiently intimated my opinion in the course of the argument. Upon the whole, therefore, I concur with my Lord in thinking that the defendant is entitled to judgment.

CRESSWELL, J. I also think our judgment upon this demurrer must be for the defendant. As to the objection that the Christian and surnames of all the creditors parties to the deed of the third part are not set out, I think the case falls within the rule cited from my brother *Stephen's* book, which permits certain matters to be alleged in general terms, with a view to avoid undue prolixity. I think the objection as to the inconsistency in the dates arises evidently from a mere clerical error, and is sufficiently cured by the other parts of the plea which have been referred to, and that we may collect from the whole of it when the deed was made. Profert is made, and some of the covenants are set out, and there is a positive averment of the execution of the deed by six sevenths in number and value of the defendant's creditors. As to the objection to the deed being pleaded as a *release*,—the defendant

(*a*) *Antè*, Vol. VIII. p. 483.

might have placed himself in a difficulty if he had pleaded it as a release *by the plaintiffs*. It is not a release of the defendant by the plaintiffs. The defendant is not released by *the deed*, but by *the act of parliament*, the 224th section of which says that the deed entered into and signed in the manner prescribed, and subject to certain conditions, "shall be as effectual and obligatory in all respects upon all the creditors who shall not have signed the same, as if they *had* duly signed it." Accordingly, the plea, after averring that the deed was executed by the required number of creditors, and shewing that the provisions of the statute had been duly complied with, concludes with an averment, that, "by reason of the matters aforesaid, and of suing the defendant in this action, the defendant became and was released and discharged from the causes of action in the introductory part of the plea mentioned, and from the plaintiffs' right to sue for the same." I think it is correctly pleaded. As to the suspension of payment, it seems to me that there is no difficulty, inasmuch as the objection arises upon general demurrer only. If the question had been raised by special demurrer, there might have been some difficulty in saying that the plea discloses a suspension of payment. It states that the defendant was a trader, and was indebted to divers persons in divers sums, and was unable to pay the same in full. When a man says that, surely it cannot be a very forced construction to say that he has failed to meet his engagements with his creditors. Upon the whole, I think the plea is sufficient, and that the defendant is entitled to judgment.

TALFOURD, J. I am of the same opinion. The objection arising from the omission of the names of the several creditors and the amount of their respective debts, has received a sufficient answer from my Lord

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and my learned Brothers. The cases cited in support of that objection, will be found to be cases where, as in *Gatty* v. *Field* (*a*), the plea professed to set out the names, but set them out imperfectly, or where the reference was of such a nature as that there could have been no objection, on the score of prolixity, to the setting them out. As to the allegation of suspension of payment, though there might have been some difficulty if the imperfect statement of it had been pointed out as ground of special demurrer, I think that, taking the statement of the deed with the antecedent and subsequent references, it sufficiently appears that the making of the deed itself amounted to a suspension of payment within the meaning of the statute. Upon the whole, it appears to me that the plea in substance satisfies all the requisites of the act of parliament, and therefore that there must be judgment for the defendant.

Judgment for the defendant (*b*).

(*a*) 9 *Q. B.* 431.

(*b*) See *Stewart* v. *Collins*, *post*. Vol. X. p. 634.

PARKER *v.* THE GREAT WESTERN RAILWAY COMPANY.

June 6.

The court refused to compel the plaintiff to give security for costs, upon affidavits stating that he was in insolvent circumstances, and had mortgaged or assigned to a third party all his interest in the subject matter of the action.

THIS was an action brought by the plaintiff, a carrier, to recover from the Great Western Railway Company a large sum of money alleged to be due to him from them for overcharges said to have been made by the company in respect of goods carried on their railway. Upon the cause coming on for trial, it was re-

ferred to an arbitrator, who was still proceeding with the reference.

On the 7th of *February* last, a notice, signed by the plaintiff, of which the following is a copy, was served upon the company: —

"To the Great Western Railway Company.

"Take notice, that, by indenture bearing date the 7th day of *February*, 1850, and made between the undersigned, *Richard Parker*, of the *New Inn Yard, Old Bailey*, in the city of *London*, common carrier, of the one part, and *John Scott*, of &c., of the other part, —after reciting, amongst other things, that the said *Richard Parker* claimed various large sums of money to be due and owing to him from the Great Western Railway Company, and had brought an action for recovery of part thereof, which action and all other matters in difference between the said *Richard Parker* and the said company had been referred to arbitration; and that the reference was still pending; and that the said *Richard Parker* was indebted to the said *John Scott* in a certain sum of money in the said indenture mentioned, —the said *Richard Parker* did thereby bargain, sell, assign, transfer, and set over unto the said *John Scott*, his executors, administrators, and assigns, all and every the several claims and demands, sums and sum of money whatsoever due and owing to the said *Richard Parker* from the Great Western Railway Company for and in respect of damages, overcharges, or otherwise, for recovery of part whereof the said action had been commenced, and in respect of other part whereof a notice in writing had been given to the said Great Western Railway Company by the said *Richard Parker*, which said notice was accompanied by three books of account containing the particulars of such last-mentioned claim, and in respect of other part

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whereof a further notice in writing had been given pursuant to the power and authority contained in the therein-recited order of reference, and also all and every other claims and demands, sums and sum of money thereafter to be made or to accrue to the said *Richard Parker*, and which should or might be included in any award to be made by the arbitrator to whom the said cause and the said matters in difference had been referred, and all and every the right and interest, benefit, claim, and demand whatsoever of the said *Richard Parker* of, in, and to the same, and every part thereof respectively, and of, in, and to the said action, reference, and the award to be made in pursuance thereof, — To hold the said premises unto the said *John Scott*, his executors, administrators, and assigns: And take further notice, that, in the said indenture is contained a power for the said *John Scott*, his executors, administrators, and assigns, to demand, recover, and receive of and from the said Great Western Railway Company, and every person whomsoever liable to pay the same, the said claims and demands, sums and sum of money, every or any part thereof, and to prosecute the said action and reference in such manner as the said *John Scott*, his executors, administrators, and assigns, might think fit, and to obtain and procure the award of the said arbitrator, and to take and prosecute all such ways and means and all such proceedings as might be necessary or proper in the judgment of the said *John Scott*, his executors, administrators, or assigns, for obtaining and enforcing the performance and fulfilment of the said award, and also to enter into any composition, compromise, or agreement touching the said claims and demands, sums and sum of money, every or any part thereof, or the said action and reference, which the said *John Scott*, his executors, administrators, or assigns might think fit; and that the consent

of the said *Richard Parker*, his executors or administrators, should not be requisite or necessary for that purpose, and to give such receipts, releases, acquittances, and discharges from time to time for all such moneys as should be paid to the said *John Scott*, his executors, administrators, or assigns, or to his or their attorney or attorneys, for or on account of the said premises, and generally to do, execute, and assent to any and every other act and thing which he or they might think proper with reference to the matters aforesaid; and in the said indenture is contained a proviso for redemption of the said premises on payment, on or before the 7th day of *May* next, by the said *Richard Parker*, his executors or administrators, to the said *John Scott*, his executors, administrators, or assigns, of the sum of 3,268*l.* 16*s.* 4*d.*, with interest thereon at the rate of 5*l.* per centum per annum, and of such further sum and sums of money as the said *John Scott*, his executors or administrators, should from time to time advance to or for the said *Richard Parker*; provided that the amount to be secured by the said indenture should not exceed in the whole the principal sum of 5,000*l.* Dated," &c.

Upon an affidavit setting forth the above facts, and further stating that the plaintiff was made a bankrupt in 1846, and that afterwards he set up again in business as a carrier at the *New Inn, Old Bailey*, but that ever since his said bankruptcy he had been in failing circumstances: that the plaintiff, for a long time prior to the said 8th of *February*, 1850, had a person in charge of his premises and his stock and plant at the *New Inn, Old Bailey*, on behalf of other persons, creditors of the plaintiff, either under an execution against the said plaintiff, or under some agreement whereby the plaintiff agreed to account to the said creditors or persons for all the business he transacted there: that the

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plaintiff had for some time past had a place other than his own premises, where he could put his waggons and carts, to prevent any person from seizing them, and that they had frequently been put there to avoid seizure by his creditors: that the horses and other plant of the plaintiff had frequently been seized by persons having claims upon him, and that the plaintiff had often been obliged to leave his goods at the station of the said railway, because he had not enough money to pay for the carriage of them: that the plaintiff had lately left the premises he occupied at the *New Inn, Old Bailey*, as aforesaid, and taken very small premises elsewhere for conducting his business of a carrier: that the plaintiff had from time to time received money from *John Scott*, mentioned in the aforesaid notice, and that the said *John Scott* had been assisting the plaintiff in all his undertakings and in this action: that, at one of the meetings held before the arbitrator, application was made to the arbitrator, by the counsel for the plaintiff, to allow the said *John Scott* to be present at the said reference, and that it was then expressly stated by the said plaintiff's counsel, as a reason for the said application, that the said *John Scott* was interested as assignee of the said claims in this action against the company; that the arbitrator acquiesced in the application; and that the said *John Scott* was present at the said meeting, and at all the subsequent meetings held under the said reference: that the said *John Scott* had for some time past found, and still found, the money for the plaintiff to conduct this action, and that there was, as the deponent believed, some agreement or understanding on the part of the said *John Scott* to pay the plaintiff's costs of this action: and that the deponent verily believed that the plaintiff was in insolvent circumstances, and altogether without means of his own, and unable to pay the defendants their costs of the action, if they should

be successful; and that the action was proceeding solely for the benefit of the said *John Scott.*

Hoggins moved for a rule calling upon the plaintiff to shew cause why the proceedings should not be stayed until he gave the defendants security for costs. The affidavit sufficiently shews that the plaintiff is insolvent, and that the action and reference are proceeding solely for the benefit of *Scott*, the assignee of the claim thereby sought to be recovered, and therefore the defendants are entitled to security. In *Perkins* v. *Adcock* (*a*), it was expressly held by the court of Exchequer, that, where a plaintiff is bankrupt or insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will require security for costs. So, in *Ball* v. *Ross* (*b*), where an action of trespass appeared to have been brought by a man in very humble circumstances, at the instigation and at the costs of his landlord, the court ordered the latter to give security for the defendant's costs,—being satisfied from the affidavits that the action was "really and substantially the action of the landlord." [*Maule*, J. You assume that the defendants are entitled to security for costs under the circumstances, even if the plaintiff be a solvent person. The authorities, however, do not warrant that. The action being brought by the proper plaintiff, he being a person having an interest in the result,—the assignment to *Scott* being by way of mortgage only,—and being solvent, surely no case is made out for calling upon him or anybody else to give security for the costs. *Wilde*, C. J. I do not recollect any case of a mere mortgagee being compelled to give security. *Maule*, J. The

(*a*) 14 *M. & W.* 808.

(*b*) 1 *M. & G.* 445, 1 *Scott, N. R.* 217.

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case of *Wray* v. *Brown* (*a*) seems conclusive on the point: there, the court refused to compel the plaintiff to give security for costs, upon an affidavit that he had been bankrupt, and thrice discharged under the insolvent debtors act, *and* that he was suing as trustee for a third person who alone was beneficially interested in the subject-matter of the action. *Tindal*, C. J., said: "It appears to me, that, as each of the grounds here urged for requiring the plaintiff to give security for costs, taken separately, is insufficient, so, taken together, they do not help each other. That the action is brought in the name of the plaintiff as trustee for a third person, is, according to the authority of *Morgan* v. *Evans* (*b*), no ground for compelling security: and *Snow* v. *Townsend* (*c*) shews that insolvency is no ground for such a motion. The true principle that governs these cases is laid down by Lord *Kenyon* in *Webb* v. *Ward* (*d*). 'It cannot,' he says, 'be laid down as a general rule, that an uncertificated bankrupt must in all cases give security for costs when an action is brought by him: that would be going much too far: each case must depend on its own circumstances. But it is fair to say, that, if the action be really brought for the benefit of the assignees, they should be responsible for the costs.' I therefore think this rule must be discharged." And *Erskine*, J., said: "Finding it to be clearly settled that the circumstance of the plaintiff having been discharged under the insolvent debtors act did not entitle him to come and ask for security for costs, the defendant adds another ground, viz. that the action is really brought for the benefit of a third person: but this was held, in *Morgan* v. *Evans*, not to be a sufficient reason for compelling

(*a*) 8 *Scott*, 557, 6 *N. C.* 271.
(*b*) 7 *J. B. Moore*, 344.
(*c*) 6 *Taunt.* 123, 1 *Marsh.* 477.
(*d*) 7 *T. R.* 296.

the plaintiff to give security. I therefore agree that the rule must be discharged." That case, I think, disposes of the present application. A man having a cause of action against another, be he ever so insolvent, has a right to enforce it in a court of law. But, if he lends his name to another, to enable that other to proceed for his own benefit, the defendant is entitled to ask for security.]

WILDE, C. J. All the cases that I am aware of in which security for costs has been enforced, have been cases where the action is shewn to have been really brought for the benefit of a third person, in the name of the nominal plaintiff. I know of none where security has been required merely on the ground that the debt has been assigned to a third person. The case of assignees suing in the name of the bankrupt is different. The mere circumstance of the party who has a lien upon the proceeds of the action attending before the arbitrator to watch the proceedings, cannot have the effect of casting upon him a liability which otherwise the law would not have cast upon him.

MAULE, J. My Brother *Coleridge*, in a case of *Andrews* v. *Marris* (*a*), states the rule very much in the terms in which it has been stated by my Lord. He says,—"The principle is, that, where another person is, in fact, proceeding with an action in the name of the party on the record, and that party is insolvent, the court will compel him for whose benefit the action is proceeding to come in and give security for costs." This case clearly does not fall within that principle.

The rest of the court concurring,

Rule refused. (*b*).

(*a*) 7 *Dowl. P. C.* 712.

(*b*) In *Day* v. *Smith*, 1 *Dowl. P. C.* 460., *Patteson*, J., says, that the rule is confined to

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cases "where a party has been deprived of *all* his property; and therefore the court forces those who are become possessed of it to give security. But there is no instance in which, an individual's property having been assigned, the courts have made the assignee find security for costs."

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June 10.

A bond given by a corporation, after the passing of the 5 & 6 *W.* 4. *c.* 76., but before the passing of 6 & 7 *W.* 4. *c.* 104., to secure a sum of money borrowed for the purpose of paying debts contracted by the corporation before the passing of the first-mentioned act, is valid, notwithstanding the 92nd section of the former act might interpose a difficulty in the way of the obligee's obtaining satisfaction of a judgment thereon.

THIS was an action of debt, in which the plaintiff declared in his first count on a bond made by the defendants on the 1st of *July*, 1836, in the second for money lent, in the third for money had and received by the defendants to his use, in the fourth for interest, and in the fifth for money due upon an account stated.

Second plea,—to the first count,—that the defendants are a body corporate, and the mayor, aldermen, and burgesses of the borough of *Gravesend*, being the borough of *Gravesend* in the schedule A. to a certain act made and passed in the sixth year of the reign of his late Majesty, King *William* the Fourth, intituled "An act to provide for the regulation of municipal corporations in *England* and *Wales*" (*a*), and that, after the passing of the said act, and before the making of the said supposed writing obligatory, to wit, on the 26th of *December*, 1835, councillors under the provisions of the said act were duly elected for the first time, and the said election was then duly declared; and thereupon then the mayor, jurats, and inhabitants of the villages and parishes of *Gravesend* and *Milton*, in the county of *Kent*, being the governing body of the body corporate named in conjunction with such borough in the said schedule, went out of office, and their whole powers and

(*a*) 5 & 6 *W.* 4. *c.* 76.

duties ceased, pursuant to the said act*: That afterwards, and after the passing of the said act, and before the making of the said supposed writing obligatory in the said first count mentioned, to wit, on the 1st of *January*, 1836, a treasurer of the said borough, to wit, one *John Hales*, was duly elected according to the provisions of the said act: That, before the making of the said supposed writing obligatory, to wit, on the day and year last aforesaid, they, the defendants, were, and from thence hitherto had been, a corporation within and subject to the provisions of the said act, and not otherwise: That afterwards, and before the passing of an act of parliament made and passed in the seventh year of the reign of his late Majesty, King *William* the Fourth, intituled "An act for the better administration of the borough fund in certain boroughs" (*a*), and before the passing of a certain act of parliament made and passed in the first year of the reign of our Lady the now Queen, intituled "An act to amend an act for the regulation of municipal corporations in *England* and *Wales*" (*b*), to wit, on the 1st day of *July*, 1836, it was unlawfully agreed by and between the plaintiff and the defendants, that the plaintiff should lend and advance to the defendants the sum of 600*l.* to be secured by such bond so conditioned as above set forth: That the plaintiff did then unlawfully lend and advance to the defendants the said sum of 600*l.*, and the defendants did then unlawfully make and deliver to the plaintiff the said supposed writing obligatory in the first count mentioned, and the same then was made and sealed as therein mentioned, and in pursuance of the said loan and advance made to the said body corporate after the passing of the said act to provide for the regulation of

(*a*) 6 & 7 *W.* 4. *c.* 104. (*b*) 7 *W.* 4. & 1 *Vict.* *c.* 78.

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municipal corporations in *England* and *Wales:* That the said writing obligatory was not made or given to secure the payment of any lawful debt due from the said body corporate to any person, contracted before the passing of the said last-mentioned act, and unredeemed, or any part thereof, or the payment of any interest of such debt or any part thereof, or any part of such interest, nor was the said supposed writing obligatory made or given in respect of any right, interest, claim, or demand of any person or persons, or body corporate or bodies corporate, by virtue of any proceeding either at law or in equity which had been instituted before the passing of the said last-mentioned act, or at any other time, or by virtue of any mortgage or otherwise: That the said supposed writing obligatory was not given for, towards, or on account of * * the salary of any mayor, or of any recorder or police magistrate whatever, or for, towards, or on account of the salary of any town-clerk or treasurer whatever, or of any other officer at any time appointed by the council of the said borough, or for, towards, or on account of any payment of any expenses incurred at any time in preparing or printing any burgess-lists, ward-lists, or notices, or other matters attending such elections as are in the said act mentioned, or for, towards, or on account of any sum whatever paid or to be paid by the said borough to the treasurer of any county as in the said last-mentioned act is provided, or for, towards, or on account of the expense of maintaining any borough-gaol, house of correction, or corporate buildings whatever, or the payment of any constables, or of any other expenses incurred in carrying into effect the provisions of the said last-mentioned act,—of which several premises the plaintiff had always had notice; wherefore the defendant said that the said writing obligatory was and is void, illegal, and of no effect,—verification.

Replication to the second plea.

To this plea the plaintiff replied, that the said sum of 6000*l.* lent and advanced by the plaintiff to the defendants as in the second plea mentioned, was money borrowed by the council of the said borough for the purpose of being applied, and which was actually applied, to wit, on &c., towards the satisfaction and discharge of a debt contracted by the said body corporate before the passing of the said act made and passed in the sixth year of the reign of his late Majesty King *William* the Fourth, intituled "An act to provide for the regulation of municipal corporations in *England* and *Wales*," to wit, a certain debt of 670*l.* due and owing to one *William Wood.*

Demurrer.

Demurrer, on the ground that it did not appear by the second plea that there was any bargain between the plaintiff and the said council and the said *William Wood*, or either of them, that the said money should be or was borrowed or applied for the purpose in the plea mentioned. Joinder.

Fifth plea.

Fifth plea,—to the second, fourth, and fifth counts, —that the defendants are a body corporate, &c. [as in the second plea, down to the first asterisk]: That afterwards, and after the passing of the said act, and before the lending of the moneys in the second count mentioned, to wit, on the 1st of *January*, 1836, a treasurer of the said borough, to wit, one *John Hales*, was duly elected according to the provisions of the said act: That, before the accruing of any of the supposed causes of action in the introductory part of this plea mentioned, to wit, on &c., the defendants were, and from thence hitherto had been, a corporation within and subject to the provisions of the said act, and not otherwise: That afterwards, and before the passing of an act of parliament made and passed in the seventh year of the reign of his late Majesty King *William* the Fourth, intituled "An act for the better administration of the borough

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fund in certain boroughs" (a), and before the passing of a certain act of parliament made and passed in the first year of the reign of our Lady the now Queen, intituled "An act to amend an act for the regulation of municipal corporations in *England* and *Wales*" (b), to wit, on the 1st of *July*, 1836, the said money in the second count mentioned was unlawfully lent to the defendants by the plaintiff: [The plea then went on to aver that the money in the fourth count mentioned was interest upon, and that the account stated in the fifth count mentioned was stated in respect of, the money lent as in the second count mentioned.] That the said supposed debt and causes of action in the introductory part of that plea mentioned were not contracted, and did not accrue, before the passing of the first-mentioned act. [The plea then proceeded to aver that the debt was not contracted in respect of any of the matters mentioned in the 5 & 6 *W.* 4, *c.* 76, *s.* 92, as in the second plea, from the double asterisk to the end; concluding with a verification.]

Replication to the fifth plea.

Replication, that the said sum of money in the second count mentioned was borrowed by the council of the borough for the purpose of being applied, and which was actually applied, to wit, on &c., towards the satisfaction and discharge of a debt contracted by the said body corporate before the passing of the said act made and passed in the sixth year of the reign of His late Majesty King *William* the Fourth, intituled "An act to provide for the regulation of municipal corporations in *England* and *Wales*," to wit, a certain debt due and owing to one *W. Wood*.

Demurrer thereto.

Demurrer, on the ground that it did not appear by the fifth plea that there was any bargain between the plaintiff and the said council and the said *W. Wood*, or

(a) 6 & 7 *W.* 4. *c.* 104. (b) 7 *W.* 4. & 1 *Vict.* *c.* 78.

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either of them, that the said money should be or was borrowed or applied for the purpose in that plea mentioned. Joinder.

Sixth plea.

Sixth plea,—to the third count,—that the defendants were a body corporate mentioned in schedule A. of the 5 & 6 *W.* 4, *c.* 76; that councillors were duly elected, and the old governing body ceased; that, after the passing of the act, and before the accruing of the cause of action in the third count mentioned, to wit, on &c., a treasurer was elected, to wit, &c.; that the defendants were and had been a corporation under the provisions of the act; that, before the passing of the statute 6 & 7 *W.* 4, *c.* 104, and before the passing of the statute 7 *W.* 4 & 1 *Vict.* *c.* 78, to wit, on &c., it was unlawfully agreed by and between the plaintiff and the defendants, that the plaintiff should lend and advance to the defendants the sum of 600*l.*, to be secured by a bond to be made and executed by the defendants, whereby they should acknowledge themselves to be held and firmly bound to the plaintiff in the penal sum of 1,200*l.*, with a condition for the payment of 600*l.*, and interest at the rate of 5*l.* per centum per annum; that the plaintiff did then unlawfully pay, lend, and advance to the defendants the said sum of 600*l.* upon the terms aforesaid, and the defendants then had and received the same in pursuance of the said last-mentioned agreement for the said loan and advance, which was the said money in the said third count mentioned, and which said having and receiving was the said having and receiving therein mentioned; that they, the defendants, gave and delivered to the plaintiff the said supposed writing obligatory in the said first count mentioned, and no other, being so null and void as in the second plea mentioned; and that the supposed debt in the third count was not contracted before the passing of the first-mentioned act. [The plea

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then went on to aver that the debt therein mentioned was not contracted in respect of any of the matters mentioned in the 5 & 6 *W.* 4, *c.* 76, *s.* 92, as in the second plea, from the double asterisk to the end; concluding with a verification.

Demurrer thereto.

To this plea the plaintiff demurred specially,—assigning for causes that the plea was argumentative; that it did not give colour; that it was consistent with the facts stated that the loan was legal; and that, if the loan and bond *were* illegal, the plea shewed no reason why the money should not be recovered under the third count. Joinder.

Peacock, for the plaintiff. The main question is, whether a corporation can legally, since the passing of the Municipal Corporation Reform Act, 5 & 6 *W.* 4. *c.* 76, give a bond for money borrowed by them. The principal objection to the power of the corporation to enter into such a bond as this, arises on the 92nd section of that act. That section enacts, "that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the schedules A. and B. to the act annexed, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for), shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called 'The Borough Fund;' and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act, and unredeemed, or so much thereof

5 & 6 *W.* 4. *c.* 76. *s.* 92. Borough fund, and its application.

as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate by virtue of any proceedings either at law or in equity which have been already instituted or which may be hereafter instituted, or by virtue of any mortgage or otherwise, — shall be applied towards the payment of the salary of the mayor and of the recorder and of the police-magistrate hereinafter mentioned, when there is a recorder or police-magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned, and, in boroughs which shall have a separate court of sessions of the peace as is hereinafter provided, towards the expenses of the prosecution, maintenance, and punishment of offenders, and towards such other sum to be paid by such treasurer of such county as is hereinafter provided, and towards the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act." The section then goes on to direct the application of the surplus, and to provide, that, if the fund should be insufficient for the purposes above mentioned, the council should order a rate to make up the deficiency. There is nothing in that section to prevent the corporation from entering into a bond. It may be that the fund

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created by that section cannot be made available for the payment of the bond; but it does not follow that the corporation may not possess other property which would be available,—things which yield no profit, such as furniture, paintings, plate, the mace, &c. By the 1st section of the 6 & 7 *W.* 4, *c.* 104, "reciting certain provisions of the 92nd section of the former act, and that certain difficulties had occurred in putting the said act into execution," it is enacted, "that, from and after the passing of this act, it shall he lawful for the council of any borough named in the said schedules to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing re-payment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said act for regulating corporations." Here, the corporation, after the passing of the 5 & 6 *W.* 4, *c.* 76, and before the passing of the 6 & 7 *W.* 4, *c.* 104, borrow money of the plaintiff for the purpose of paying an old debt, giving him this bond by way of security. Under the last-mentioned act they might have given the bond to the original creditor, and then no question could have arisen. The 28th section of the 7 *W.* 4 & 1 *Vict.* *c.* 78 — reciting that by the 6 & 7 *W.* 4, *c.* 104, it is enacted "that it shall be lawful for the council of any borough named in the schedules A. and B. annexed to the 5 & 6 *W.* 4, *c.* 76, to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing re-payment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said act for regulating corporations," enacts — "that any money borrowed by any such council for the purpose of being applied, and which shall be actually applied, in or towards satisfaction and discharge of any such pre-existing debt or

obligation, shall be deemed and taken to be, within the true intent and meaning of the said act of the last session of parliament (6 & 7 *W.* 4. *c.* 104), a debt contracted by or on behalf of such body corporate before the passing of the said act for regulating corporations." If that provision is retrospective, there is an end of the question. [*Maule*, J. The 28th section of the 7 *W.* 4 & 1 *Vict. c.* 78, is merely an extension of the 1st section of the 6 & 7 *W.* 4, *c.* 104; and that applies only to cases arising after the passing of that act. As soon as the 20th of *August*, 1836, arrived, the corporation might lawfully give a bond for securing a debt contracted by them before the passing of the 5 & 6 *W.* 4, *c.* 76. But this bond was given before that date.] The Municipal Corporation Reform Act does not take away the right of the corporation to execute a bond. [*Maule*, J. If you are right in that, we need not embarrass ourselves with the other questions.] There may, no doubt, be a difficulty in enforcing the judgment, inasmuch as the borough fund could not be made available to pay it: see *The Attorney-General* v. *Aspinall.* (*a*) Still it is submitted that there is nothing in the 92nd section to prevent the corporation from entering into such a contract. The sixth plea, to the third count, is clearly a mere argumentative denial that the corporation received the money to the use of the plaintiff. If it should appear that the money was obtained by them in pursuance of an illegal agreement, that would arise under not guilty. [*Maule*, J. The defendants say the bond is void, — that it is given upon a consideration which has failed.]

Bramwell, contrà. The authorities are numerous to shew that the 7 *W.* 4, & 1 *Vict. c.* 78, *s.* 28, is not

(*a*) 2 *Mylne & Cr.* 613.

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retrospective. [To this the whole court assented.] The object was, to allow the corporation to do something which before they could not do. Then, this is not an instrument that can be enforced against the corporation, inasmuch as it is given to secure a debt which the borough fund is not liable to the payment of. It may seem strange to say that a corporate body, having a corporate seal, cannot bind themselves by a bond. But it is submitted that they have no more authority to borrow money than have overseers or surveyors. All property of the corporation must be equally exempted from the payment of debts. There can be no reason why the legislature should make any distinction in this respect between property which produces profit and that which produces none. [*Maule*, J. The corporation might clearly sell any chattels they possessed. Might they not also be taken in execution?] Clearly not. No property of the corporation could lawfully be applied to the payment of this debt. The court cannot give judgment against the defendants in this action, because such judgment would be attended with consequences which the legislature has declared shall not ensue. A corporation cannot anticipate its future means, be they what they may. In *The Queen* v. *The Town Council of Lichfield* (*a*), the court of Queen's Bench quashed an order of the town council for the payment of a debt secured by the mayor's promissory note, for a sum of money borrowed for the purpose of paying debts of the corporation incurred since the passing of the 5 & 6 *W.* 4. *c.* 76. [*Talfourd*, J. The question there was as to the applicability of the borough fund.] As to the point of form, — the sixth plea, it is submitted, is a good plea, inasmuch as it confesses and avoids; it shews the bond declared on to be

(*a*) *Dav. & Meriv.* 491.

that the contract is an unlawful one, the defendants have confessed the receipt of so much money, and then the plea is bad.

Peacock, in reply, was stopped by the court.

MAULE, J. (*a*) I am of opinion that this bond is a good and valid bond. As to what property may be taken in satisfaction of the judgment in this case, or what may be the difficulties in the way of enforcing it, these are matters which we are not now called upon to consider. The only question at present before the court, is, whether the plaintiff shall recover, or whether he shall take nothing by his writ. I see nothing in the Municipal Corporation Reform Act to render this bond invalid. It is conceded that it would have been valid before that act. The 92nd section creates a "borough fund," which is to consist of the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities, belonging or payable to the body corporate, or to any member thereof in his corporate capacity, and of all fines or penalties for offences against the act the application of which had not already been provided for; and, on failure of these several sources of revenue, the borough fund is to be made up by a rate imposed upon the inhabitants. It then goes on to direct what expenses shall be paid out of the borough fund, and concludes with a provision that nothing therein contained shall be construed to render any part of the real or personal estate of the corporation liable to the payment of any debt contracted by the corporation before the passing of the act. The bond in question was given for money borrowed by the corporation after the pass-

(*a*) *Wilde*, C. J., was absent.

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ing of the act. It does not, however, follow that the bond cannot be enforced. It does not follow that the corporation may not have property which is not directly affected by s. 92, and which is at their disposition independently of the act: and I see no reason why property which might be charged or disposed of at the will of the corporation, might not be subject to an execution for the purpose of satisfying a judgment on this bond. Assuming it, therefore, to be true that the fact that no execution *could* issue upon a judgment if obtained, might be pleaded in bar, it seems to me that there is a total failure of any ground being shewn for the argument that has been urged on the part of the defendants. I therefore think that the bond is a good one, and consequently it follows, as has been very properly conceded, that the pleas are bad, and that there must be judgment for the plaintiff.

CRESSWELL, J. I am of the same opinion. Considering the powers which corporations possessed before the passing of the 5 & 6 *W.* 4, *c.* 77, I cannot see anything in that act to prevent them from executing an instrument of this nature. The simple question for us to determine, is, whether this is a legal bond upon which the obligee may maintain an action. I agree with my brother *Maule* in thinking that it is, and therefore that the plaintiff must have judgment.

TALFOURD, J. I am entirely of the same opinion. It is not contended that this bond would not have been valid at common law: but we are asked to infer that it is invalid by reason of the provisions contained in the 92nd section of 5 & 6 *W.* 4, *c.* 77. Giving to the argument urged on the part of the defendants its fullest effect, it merely raises difficulties in the way of the plaintiff in enforcing the judgment. Whether the

plaintiff can obtain the fruits of his judgment by an execution or by a mandamus, the bond is clearly a valid bond, and our judgment must, *valeat quantum*, be for the plaintiff.

Judgment for the plaintiff.

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MERITON v. COOMBES and Another.

June 10.

To trespass for breaking and entering the plaintiff's dwelling-house, ejecting and expelling the plaintiff and his family therefrom, and seizing his goods, the defendants pleaded, "as to the trespasses in and to the dwelling-house, and seizing and taking the goods," *liberum tenementum*. The plaintiff traversed the *liberum tenementum*, and new-assigned the *expulsion*:—Held, on demurrer, that the new-assignment was bad, the pleas justifying the expulsion, as well as the breaking and entering of the dwelling-house and the seizure of the goods.

THIS was an action of trespass for breaking and entering the dwelling-house of the plaintiff, and remaining therein, and breaking the doors &c., and ejecting, expelling, putting out, and removing the plaintiff and his family, servants, and lodgers from and out of the possession, and seizing the plaintiff's goods, &c.

The defendants pleaded,—thirdly, as to the seizing and taking the goods, that the defendant *Coombes* was lawfully possessed of a certain dwelling-house, to wit, &c., and, because the goods and chattels in the declaration mentioned were wrongfully in and upon the said dwelling-house, incumbering the same, and doing damage therein to the defendant *Coombes*, the defendant *Coombes*, in his own right, and the defendant *Colls* as his servant, and by his command, at the same time when &c., seized and took the said goods and chattels in the declaration mentioned, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage &c.,—verification.

Fourthly, as to the trespasses in and to the dwelling-house, and seizing and taking the goods, that the said

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dwelling-house is and was the dwelling-house, soil, and freehold of *Edward Majoribanks* and Sir *Edmund Antrobus*, Bart., wherefore the defendants, as the servants of the said *Edward Majoribanks* and Sir *Edmund Antrobus*, and by their command, broke and entered the said dwelling-house, and, because the said goods and chattels in the declaration mentioned were in and upon the said dwelling-house, incumbering the same, the defendants, as the servants of the said *Edward Majoribanks* and Sir *Edmund Antrobus*, and by their command, removed and carried away the same to a small and convenient distance, doing no unnecessary damage, &c.,—verification.

Fifthly, as to the trespass in and to the dwelling-house, and seizing and taking the plaintiff's goods, that the dwelling-house was the dwelling-house, soil, and freehold of *Catherine Campbell Preston*, wherefore the defendants as her servants and by her command broke and entered the said dwelling-house, and, because the said goods and chattels were in and upon the said dwelling-house, incumbering the same, the defendants, as the servants of the said *Catherine Campbell Preston*, and by her command, removed and carried away the same to a small and convenient distance, doing no unnecessary damage, &c.,—verification.

The plaintiff replied *de injuriâ* to the third plea, and traversed the fourth and fifth pleas. He also new-assigned, that he sued out his writ, and declared in this action, not only for the said several trespasses in the introductory parts of the third, fourth, and last pleas respectively, and in the declaration, in that behalf mentioned, and in those pleas attempted to be justified, but also for that the defendants, at the said times when &c., ejected, expelled, put out, and amoved the plaintiff and his family, servants, and lodgers, from and out of the possession and enjoyment of the said dwelling-house, with

the appurtenances, in the declaration mentioned, and kept and detained them so ejected and expelled for the said space of time in the declaration in that behalf mentioned, whereby the plaintiff during all such time lost and was deprived of the use and benefit of his said dwelling-house, &c., which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said third, fourth, and last pleas mentioned, and therein attempted to be justified; wherefore, inasmuch as the defendant had not answered the said trespasses above newly assigned, the plaintiff prayed judgment and his damages by him sustained on occasion of the committing thereof to be adjudged to him, &c.

The defendants demurred specially to the replications and the new-assignment, on the ground, amongst others, of duplicity.

Corrie, in support of the demurrer. The new-assignment is clearly bad, and the pleas afford a good answer to the declaration. [*Cresswell*, J. Has not the owner a right to turn out of his house a man who is there without any lawful title?]

John Gray, contrà. The breaking and entering may possibly be justified under *liberum tenementum.* The plaintiff therefore new assigns the expulsion as a substantive trespass. The justifications may be assumed to be addressed to the breaking and entering, which are the substance of the charge, the expulsion being mere matter of aggravation: *Taylor* v. *Cole* (*a*). In that case, Lord *Loughborough*, in giving the judgment of the Exchequer Chamber, says: "Undoubtedly, to enter into a house and to expel the possessor may be distinct acts, and they may be also connected. But, when the plaintiff charges them as parts of one trespass,

(*a*) 1 H. Blac. 555.

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as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or *new-assignment*, state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation." Here, the plaintiff has adopted that course. It may be that it may be proved at the trial, that the title relied on by the defendants, had ceased at the time of the expulsion. [*Maule*, J. Is a new-assignment the proper course? Should you not have replied?] *Smith* v. *Monprivatt* (*a*) shews that a new-assignment is the proper course. There, to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded not guilty, and a justification as to breaking and entering and staying in the house twenty-four hours, under a writ of *fi. fa.* The defendants (the sheriffs) proved their justification; but it appeared that their officers continued in the plaintiff's house beyond twenty-four hours. It was contended, for the plaintiff, that the excess beyond twenty-four hours stood merely upon the plea of not guilty; and, as the defendants had been proved to have been guilty of remaining in the house longer than they pretended to justify, the plaintiff was entitled to a verdict and damages for what he had thereby suffered. But Lord *Ellenborough* said: "I am of opinion that the last plea in point of law applies to the whole declaration; and that, if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new-assignment." (*b*)

Corrie, in reply. The object of a new-assignment is,

(*a*) 2 *Campb.* 174.

(*b*) See *Dye* v. *Leatherdale*, 3 *Wils.* 20; *Fisherwood* v. *Cannon*, 3 *T. R.* 297; *Gates* v. *Bayley*, 2 *Wils.* 313; *Cheasley* v. *Barnes*, 10 *East*, 73.

to "re-state, in a more minute and circumstantial manner, the cause of action, or some part thereof, alleged in the declaration, in consequence of the defendant having, through mistake or design, omitted to answer it in his plea. It is therefore in the nature of a new declaration, or, rather, it is a more precise and particular repetition of the declaration in those cases where the law permitted a *general* form of declaring equally applicable to two or more states of facts, but leaving it doubtful in the description *which* was intended:" 1 *Chitty on Pleading*, 7th edit., 653. If the plaintiff acquired title at any time, the defendants' justification fails. The third plea is not pleaded to the expulsion. To be good, the new-assignment must be good as to the whole to which it is pleaded. [*Maule*, J. It may perhaps be doubtful whether this new-assignment states a trespass.] It re-asserts everything stated in the declaration.

MAULE, J. (*a*) It appears to me that the new-assignment in this case is bad. The declaration complains that the defendants, on &c., and on divers other days and times, with force and arms &c., broke and entered the plaintiff's dwelling-house, and remained therein, broke the doors, &c., and expelled and put out the plaintiff and his family, servants, and lodgers, and seized his goods, &c. To this the defendants have pleaded several pleas of liberum tenementum, one of them commencing "as to the seizing and taking the goods," and the other "as to the trespasses in and to the dwelling-house, and seizing and taking the goods," and justifying all the trespasses alleged in the declaration. Then comes a replication, traversing the liberum tenementum; and, further, there is a new-

(*a*) The Lord Chief Justice was absent, on account of indisposition.

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assignment, that the plaintiff sued out his writ and declared in the action, not only for the several trespasses in the introductory parts of the third, fourth, and last pleas respectively, and in the declaration, in that behalf mentioned, and in those pleas attempted to be justified, — that is to say, the trespasses in and to the dwelling-house, and seizing and taking the goods, — but also for that the defendants, at the said times when &c., ejected, expelled, put out, and amoved the plaintiff and his family, servants, and lodgers from and out of the possession and enjoyment of the said dwelling-house, with the appurtenances, in the declaration mentioned, and kept and detained them so ejected, and expelled for the said space of time in the declaration in that behalf mentioned, whereby the plaintiff during all such time lost and was deprived of the use and benefit of his said dwelling-house, &c., which said trespasses above newly assigned were other and different trespasses than the said trespasses in the said third, fourth, and last pleas mentioned, and therein attempted to be justified. It may be doubted whether the matter contained in this new-assignment would, on general demurrer, constitute a good declaration in trespass. It does not state that the defendants committed any assault upon the plaintiff; but that they ejected and expelled him and his family, servants, and lodgers from the dwelling-house. Removing a person from the possession of a dwelling-house is a trespass to a dwelling-house. A trespass is personal because it is an injury to the person. This is an injury to the dwelling-house within the meaning of, and justified by, the pleas. I therefore think that the new-assignment is bad, and consequently that the judgment must be for the defendants.

CRESSWELL, J. I am also of opinion, for the reasons

given by my brother *Maule*, that the defendants are entitled to judgment on this demurrer. The new-assignment shews the trespass complained of is a matter that has already been justified.

TALFOURD, J., concurred.

Judgment for the defendants.

MONYPENNY *v.* DERING and Others. (*a*)

The testator devised lands to P. M. (his brother) for life, remainder to the use of the first son of the body of P. M. for life, remainder to the use of the first son of the body of such first son, and the heirs male of his body; and, in default of such issue, to the use of all and every other son and sons of the body of his said brother P. M., severally and successively, according to seniority of age, for the life interests and limitations as he had before directed respecting the first son and his issue; and, in default of issue of the body of his said brother P. M., or in case of his not leaving any at his decease, to the use of his brother T. M. for life, remainder to T. M., the eldest son of T. M. for life, remainder to the first son of the body of T. M. the son, and the heirs male of his body; and, in default of issue of the body of T. M. the son, to the use of all and every other the son and sons of the body of the testator's brother T. M., for the like estates and interests, severally and successively, according to seniority of age; and, in failure of all such issue of the body of his said brother T. M., to the use of him, his heirs and assigns, for ever: and the testator declared, that, if his said brothers, or either of them, or either of their issue, should become entitled to the estate,

THE following case was sent by his Honor Vice-Chancellor *Wigram* for the opinion of this Court:—James *Monypenny*, late of *Maytham Hall*, in the

(*a*) The plaintiff in the suit was *Robert Thomas Gybbon Gybbon Monypenny*.

The defendants were,—*Robert Dering, Thomas Gybbon Monypenny; Robert Phillips Dearden Monypenny*, an infant, by *James Dearden*, his guardian; *James Isaac Monypenny; Phillips Monypenny; William Backhouse Monypenny; Charles Dawson; William David Cathcart Monypenny*, and *Thomas Phillips Blackwell Monypenny, Richard James Laud Monypenny, James Robert Blackwell Monypenny*, and *Phillips Howard Monypenny*, infants, by *John Cavell*, their guardian; *Susannah Monypenny; Peregrine Royds Dearden; John Corsley;* and *Elizabeth Charlotte*, now the wife of *Henry Doyle Sewell*.

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parish of *Rolvenden*, in the county of *Kent*, was, at the time of the making of his last will and testament hereinafter mentioned, and thenceforth up to and at the time of his death, seised in fee-simple of, or otherwise well entitled to, divers hereditaments and premises in the said county of *Kent*, respectively called *Maytham Hall* Estate, and *Lower Maytham Hall* Estate, all which said hereditaments and premises were of gavelkind tenure.

The said *James Monypenny*, being so seised or entitled as aforesaid, and being of sound and disposing mind, memory, and understanding, on the 11th of *February*, 1804, duly made and published his last will

or any part thereof, of E. Joddrell, the estate theretofore devised for the benefit of his said brothers and their issue should become and be and remain to the use of the next person entitled thereto, as they would have done if the person so succeeding to the Joddrell estate were actually dead.

By a codicil, the testator devised the same lands to his wife for life, and, after her decease, to the same uses as were declared by his will.

The testator's brother P. M., after the death of the widow, viz., in Michaelmas Term, 1827, suffered a recovery of the devised estates, to the use of the said P. M. in fee.

By a settlement on the marriage of R. J. M. (nephew of P. M.) with Susannah M., dated the 10th of June, 1835, P. M. charged the estate with a jointure of 300*l.* per annum to her in the event of her surviving them, P. M. and R. J. M.

In January, 1841, P. M. died without ever having had any issue, and having by his will devised the estates in question to his nephew R. J. M. for life, with remainder to his eldest son R. P. D. M. for life, remainder to his first and other sons successively in tail male, with divers remainders over.

In September, 1842, R. J. M. died, leaving his widow Susannah M. and R. P. D. M., his only son (then an infant), him surviving:—

Held,—first, that the testator's brother P. M. took an estate for life in remainder after the life estate of the widow:

Secondly, that T. G. M. took an estate for life in remainder after the life-estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his (T. G. M.'s) becoming entitled to the Joddrell estates; and also a remainder in tail general after the estate-tail of R. T. G. G. M. (son of T. G. M.):

Thirdly, that R. T. G. G. M. took a contingent remainder in tail male after the determination of the life-estate of his father T. G. M.:

Fourthly, that P. M. acquired no estate or interest under the recovery:

Fifthly, that Susannah M. took no estate or interest under the deed of the 10th of June, 1835:

Sixthly, that the co-heirs in gavelkind took a remainder in fee after the several estates above mentioned.

Will of *James Monypenny.*

and testament in writing, dated the 11th day of *February*, 1804, and duly executed and attested as by law was then required for passing real estates by devise, and thereby he devised the said *Maytham Hall* Estates as follows:—" I give and devise my said house called *Maytham Hall*, with all and every the appurtenances, to the uses, intents, and purposes following, that is to say, To the use, intent, and purpose that my brother *Phillips Monypenny* shall receive and take the rents, issues, and profits thereof for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of the first son of the body of the said *Phillips Monypenny* for and during the term of his natural life; and, from and immediately after his decease, to the use of the first son of the body of such first son, and the heirs male of his body; and, in default of such issue, to the use of all and every other son and sons of the body of my said brother *Phillips Monypenny*, severally and successively, according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue: and, in default of issue of the body of my said brother *Phillips Monypenny*, or in case of his not leaving any at his decease, to the use of my brother *Thomas Monypenny* for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of *Thomas Monypenny*, the eldest son of my said brother *Thomas Monypenny*, for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of the first son of the body of the said *Thomas Monypenny*, son of my said brother *Thomas Monypenny*, and the heirs male of his body; and, in default of issue of the body of the said *Thomas Monypenny* the son, to the use of all and every other the son and sons of the body of my said

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brother *Thomas Monypenny*, for the like estates and interests, severally and successively, according to the seniority of age: And, in failure of all such issue of body of my said brother *Thomas Monypenny*, to the use of him, his heirs and assigns, for ever. And I do hereby declare, that, if it shall happen at any time hereafter that my said brothers, or either of them, their or either of their issue, shall become entitled to the real or copyhold estate, or any part thereof, late of *Elizabeth Joddrell*, widow, daughter of the late *Phillips Gybbon*, situate in the said parish of *Rolvenden*, or in the parishes of *Benenden*, *Tenterden*, or either of them, or elsewhere, then and in that case, and immediately upon such event taking place, the said estates hereinbefore devised for the benefit of my said brothers and their issue shall be and remain to the use of the next person entitled thereto under and by virtue of this my will, in the same manner as they would have done if the person so succeeding to the said estate late of the said *Elizabeth Joddrell* were actually dead. And I declare that my said devisees, as they may hereafter respectively become entitled to my said estates, shall be at full liberty to fell and cut all such timber and underwood as will not improve by standing, and shall not be impeached or impeachable for such waste; and shall and may, as they respectively become entitled, grant leases of my said estates, or any part or parts thereof, not exceeding seven years, so that such lease and leases be granted for the best and utmost improved rent that can be procured for the same, and so that no sum or sums of money be paid by any lessee or lessees in consideration of such lease or leases."

Death of testator's brother *Thomas*.

After the date of the will, and before the date of the codicil afterwards stated, the testator's brother *Thomas Monypenny* died, leaving his son *Thomas*, named in the

will, him surviving; and such son afterwards took the name of *Thomas Gybbon Monypenny.*

On the 25th of *July*, 1818, the said testator *James Monypenny*, being of sound and disposing mind, memory, and understanding, duly made and published a codicil to his said will, dated the said 25th of *July*, 1818, and executed and attested as by law was then required for passing real estate by devise, and therein recited that his brother *Thomas* had died; and, after reciting that by his said will he gave and devised his said house called *Maytham Hall*, with all and every the appurtenances, unto and to the uses in the said will expressed, he revoked the said devise, and did thereby give and devise his house called *Maytham Hall*, with all and every the appurtenances, to the uses, intents, and purposes thereinafter expressed and referred to, that is to say, to the use, intent, and purpose that his wife should receive and take the rents, issues, and profits thereof from the time of his decease for and during the term of her natural life, without impeachment of waste, but subject to the keeping up, supporting, and maintaining the buildings and fences belonging thereto; and, from and immediately after her decease, to such and the same uses as were declared of the said hereditaments by his said will, and subject to the declaration contained in his said will in case his said brothers, or either of them, their or either of their issue, should become entitled to the said estate of *Elizabeth Joddrell*, widow. And the said testator ratified and confirmed his will in all other respects.

Codicil.

The said testator *James Monypenny* afterwards made two other codicils to his said will, neither of which in any manner affected the disposition of his real estate made by his said will and first codicil.

The said testator *James Monypenny* died in *June*, 1822, without having in any manner revoked or altered

Death of the testator.

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the disposition of the said *Maytham Hall* estate made by his will and first codicil, and leaving him surviving his wife *Mary Monypenny*, and his brother the said *Phillips Monypenny*, and the said *Thomas Gybbon Monypenny*, son of his deceased brother *Thomas Monypenny*.

On the testator's death, his widow *Mary Monypenny* entered into the receipt of the rents and profits of the said *Maytham Hall* estate, and continued to receive and enjoy the same until her death in the year 1826.

After the widow's death, the said *Phillips Monypenny*, the brother of the testator, entered into the receipt of the rents and profits of the said estates, and continued in such receipt until the time of his decease.

Recovery.

In *Michaelmas* Term, 1827, *Phillips Monypenny* duly suffered a common recovery of the devised estates, in which he was vouched, and vouched over the common vouchee; and such recovery was declared to enure to the use of the said *Phillips Monypenny* in fee.

Estate charged.

By a settlement executed on the marriage of *Robert Joseph Monypenny*, the nephew of the said *Phillips Monypenny*, with the defendant *Susannah Monypenny*, dated the 10th of *June*, 1835, the said *Phillips Monypenny* charged the said *Maytham Hall* estate with the payment of a jointure of 300*l.* per annum to the said *Susannah Monypenny*, in the event of her surviving the said *Phillips Monypenny* and *Robert Joseph Monypenny*.

Death of *Phillips Monypenny* without issue.

In *January*, 1841, *Phillips Monypenny* died, without ever having had any issue, but having made a will, by which he devised the *Maytham Hall* estate to certain uses in favour of his nephew the said *Robert Joseph Monypenny*, for life, with remainder to his eldest son *Robert Phillips Dearden Monypenny* for his life, with remainder to his first and other sons successively in tail male, with divers remainders over.

On the death of the said *Phillips Monypenny*, the

said *Robert Joseph Monypenny* entered into the receipt of the rents and profits of the said *Maytham Hall* estate, claiming under the said devise to him in the will of the said *Phillips Monypenny*, and continued in such receipt until the time of his death.

Death of *R. J. Monypenny.*

In *September*, 1842, the said *Robert Joseph Monypenny* died, leaving the said defendant *Susannah Monypenny*, his widow, and *Robert Phillips Dearden Monypenny*, his only son, then an infant of the age of six years, him surviving; and the said *Robert Phillips Dearden Monypenny* thereupon, by two of his guardians (being the defendants *Susannah Monypenny* and *Peregrine Royds Dearden*), entered into the receipt of the rents and profits of the *Maytham Hall* estate, subject to the jointure of his mother the said *Susannah Monypenny*, and is still in possession of the said estates, claiming under the devise to him in the said will of the said *Phillips Monypenny*.

The said *Thomas Gybbon Monypenny* has become entitled to, and is now in the possession of, the estates of the said *Elizabeth Joddrell.*

The said *Thomas Gybbon Monypenny* is married, and the plaintiff, *Robert Thomas Gybbon Monypenny*, is his first son. The defendants *Susannah Monypenny*, *Peregrine Royds Dearden*, *John Corsley*, *Thomas Gybbon Monypenny*, *Robert Phillips Dearden Monypenny*, *James Isaac Monypenny*, *Phillips Monypenny*, and *William Backhouse Monypenny*, are the co-heirs, or represent the interests of co-heirs, of the testator *James Monypenny*, at the time of his own death and of the death of the testator *Phillips Monypenny*.

Parties claiming.

The plaintiff, the said *Robert Thomas Gybbon Gybbon Monypenny*, claims the *Maytham Hall* estate as tenant in tail male thereof, by virtue of the devise to him as the first son of the said *Thomas Gybbon Mony-*

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penny, in the will of the said testator *James Monypenny*.

The defendant the said *Robert Phillips Dearden Monypenny* claims to retain the possession of the said *Maytham Hall* estate as devisee for life under the will of the said *Phillips Monypenny*, subject to his mother's jointure, on the ground that the said *Phillips Monypenny* acquired the fee-simple of the said estate by the said common recovery suffered by him in 1827; and he also claims as representing two of the co-heirs in gavelkind of the testator *James Monypenny*, in case the limitations in the will of *James Monypenny*, succeeding the limitation to the first son of *Phillips Monypenny* for life, should be held to be void.

The defendants *William David Cathcart Monypenny*, *James Robert Blackwell Monypenny*, and *Phillips Howard Monypenny*, are infants, and remainder-men in tail next in succession to the defendant *Robert Phillips Dearden Monypenny* under the will of the said *Phillips Monypenny*. *William David Cathcart Monypenny* is also tenant-in-tail next in succession to the plaintiff under the will of the said *James Monypenny*, if the recovery be void.

The defendant *Thomas Gybbon Monypenny* claims the *Maytham Hall* estate as tenant for life thereof, by virtue of the devise to him in the will of the said testator *James Monypenny*, on the ground that it did not shift from him on his accession to the estates of *Elizabeth Joddrell*; and he also claims by descent as one of the co-heirs in gavelkind of the testator *James Monypenny*, in case the limitations in the will of *James Monypenny*, succeeding the limitation to the first son of *Phillips Monypenny* for life, should be held to be void.

The said *Susannah Monypenny* claims her said jointure of 300*l.* under the said settlement of 1835,

on the same grounds upon which her said son, the said *Robert Phillips Dearden Monypenny*, claims his life-estate.

The defendant *Elizabeth Charlotte Sewell* claims a legacy charged on the *Maytham Hall* estate by the will of the said *Phillips Monypenny*.

The other defendants, representing co-heirs in gavelkind of the said *James Monypenny*, claim the said *Maytham Hall* estate, on the ground that the devises of the estate in the will and codicil of the said *James Monypenny* after the devise to the first son of the said *Phillips Monypenny*, were void.

The questions in this case have reference to these conflicting claims.

Questions.

The questions for the opinion of the court, were,—

First, what estate or estates, in possession or in remainder, did *Phillips Monypenny* take under the will and codicil of the testator *James Monypenny* in the *Maytham Hall* property?

Secondly, did *Thomas Gybbon Monypenny* take any, and what, estate or estates in the *Maytham Hall* property, under the same will and codicil?

Thirdly, did *Robert Thomas Gybbon Gybbon Monypenny* take any, and what, estate or estates in the same property, under the same will and codicil?

Fourthly, did *Phillips Monypenny* acquire any, and what, estate in the same property, under the recovery of 1827?

Fifthly, did *Susannah Monypenny* take any, and what, estate or interest in the same property, under the deed of the 10th of *June*, 1835?

Sixthly, did the co-heirs in gavelkind of the said testator, at his death, take by descent from the testator *James Monypenny* any, and what, estate in the same property?

Either party was to be at liberty to refer to the will of the testator *James Monypenny*.

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SUPPLEMENTAL CASE.

The said testator *James Monypenny* also by his said will devised the said *Lower Maytham Hall* estate as follows:—

Devise of the *Lower Maytham Hall* estate.

"I give and devise my said house called *Lower Maytham Hall*, with all and every the appurtenances, to the uses, intents, and purposes following, that is to say, To the use of my brother *Phillips Monypenny*, and his assigns, for and during the term of his natural life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture or otherwise, in the life-time of the said *Phillips Monypenny*, To the use of *John Jones* and *Richard Smith*, their heirs and assigns, during the life of the said *Phillips Monypenny*, upon trust to preserve the contingent uses and estates hereinafter limited from being defeated; and, from and immediately after the decease of the said *Phillips Monypenny*, To the same uses, subject to the same declarations, and with the same powers, as are expressed in the same will concerning the said *Maytham Hall* estate, subject to the limitation thereof to the use of the said *Phillips Monypenny* during his life."

The said testator *James Monypenny*, by the said codicil to his said will, dated the 25th of *July*, 1818, repeated the same language with reference to the said *Lower Maytham Hall* estate as he had thereinbefore used with reference to the said *Maytham Hall* estate, substituting only the words "*Lower Maytham Hall*" for the words "*Maytham Hall*."

For the deaths and other circumstances material to the consideration of the questions in this case, the court is referred to the statements contained in the case to which the present one is supplemental. Those statements are to be read as if inserted in this place, except

given by my brother *Maule*, that the defendants are entitled to judgment on this demurrer. The new-assignment shews the trespass complained of is a matter that has already been justified.

TALFOURD, J., concurred.

Judgment for the defendants.

MONYPENNY *v.* DERING and Others. (*a*)

THE following case was sent by his Honor Vice-Chancellor *Wigram* for the opinion of this Court:—

The testator devised lands to P. M. (his brother) for life, remainder to the use of the first son of the body of P. M. for life, remainder to the use of the first son of the body of such first son, and the heirs male of his body; and, in default of such issue, to the use of all and every other son and sons of the body of his said brother P. M., severally and successively, according to seniority of age, for the life interests and limitations as he had before directed respecting the first son and his issue; and, in default of issue of the body of his said brother P. M., or in case of his not leaving any at his decease, to the use of his brother T. M. for life, remainder to T. M., the eldest son of T. M. for life, remainder to the first son of the body of T. M. the son, and the heirs male of his body; and, in default of issue of the body of T. M. the son, to the use of all and every other the son and sons of the body of the testator's brother T. M., for the like estates and interests, severally and successively, according to seniority of age; and, in failure of all such issue of the body of his said brother T. M., to the use of him, his heirs and assigns, for ever: and the testator declared, that, if his said brothers, or either of them, or either of their issue, should become entitled to the estate,

James *Monypenny*, late of *Maytham Hall*, in the

(*a*) The plaintiff in the suit was *Robert Thomas Gybbon Gybbon Monypenny*.

The defendants were,—*Robert Dering, Thomas Gybbon Monypenny; Robert Phillips Dearden Monypenny*, an infant, by *James Dearden*, his guardian; *James Isaac Monypenny; Phillips Monypenny; William Backhouse Monypenny; Charles Dawson; William David Cathcart Monypenny*, and *Thomas Phillips Blackwell Monypenny, Richard James Laud Monypenny, James Robert Blackwell Monypenny*, and *Phillips Howard Monypenny*, infants, by *John Cavell*, their guardian; *Susannah Monypenny; Peregrine Royds Dearden; John Corsley;* and *Elizabeth Charlotte*, now the wife of *Henry Doyle Sewell*.

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assignment, that the plaintiff sued out his writ and declared in the action, not only for the several trespasses in the introductory parts of the third, fourth, and last pleas respectively, and in the declaration, in that behalf mentioned, and in those pleas attempted to be justified, — that is to say, the trespasses in and to the dwelling-house, and seizing and taking the goods, — but also for that the defendants, at the said times when &c., ejected, expelled, put out, and amoved the plaintiff and his family, servants, and lodgers from and out of the possession and enjoyment of the said dwelling-house, with the appurtenances, in the declaration mentioned, and kept and detained them so ejected, and expelled for the said space of time in the declaration in that behalf mentioned, whereby the plaintiff during all such time lost and was deprived of the use and benefit of his said dwelling-house, &c., which said trespasses above newly assigned were other and different trespasses than the said trespasses in the said third, fourth, and last pleas mentioned, and therein attempted to be justified. It may be doubted whether the matter contained in this new-assignment would, on general demurrer, constitute a good declaration in trespass. It does not state that the defendants committed any assault upon the plaintiff; but that they ejected and expelled him and his family, servants, and lodgers from the dwelling-house. Removing a person from the possession of a dwelling-house is a trespass to a dwelling-house. A trespass is personal because it is an injury to the person. This is an injury to the dwelling-house within the meaning of, and justified by, the pleas. I therefore think that the new-assignment is bad, and consequently that the judgment must be for the defendants.

CRESSWELL, J. I am also of opinion, for the reasons

given by my brother *Maule*, that the defendants are entitled to judgment on this demurrer. The new-assignment shews the trespass complained of is a matter that has already been justified.

TALFOURD, J., concurred.

Judgment for the defendants.

MONYPENNY *v.* DERING and Others. (*a*)

THE following case was sent by his Honor Vice-Chancellor *Wigram* for the opinion of this Court:—

The testator devised lands to P. M. (his brother) for life, remainder to the use of the first son of the body of P. M. for life, remainder to the use of the first son of the body of such first son, and the heirs male of his body; and, in default of such issue, to the use of all and every other son and sons of the body of his said brother P. M., severally and successively, according to seniority of age, for the life interests and limitations as he had before directed respecting the first son and his issue; and, in default of issue of the body of his said brother P. M., or in case of his not leaving any at his decease, to the use of his brother T. M. for life, remainder to T. M., the eldest son of T. M. for life, remainder to the first son of the body of T. M. the son, and the heirs male of his body; and, in default of issue of the body of T. M. the son, to the use of all and every other the son and sons of the body of the testator's brother T. M., for the like estates and interests, severally and successively, according to seniority of age; and, in failure of all such issue of the body of his said brother T. M., to the use of him, his heirs and assigns, for ever: and the testator declared, that, if his said brothers, or either of them, or either of their issue, should become entitled to the estate,

James *Monypenny*, late of *Maytham Hall*, in the

(*a*) The plaintiff in the suit was *Robert Thomas Gybbon Gybbon Monypenny*.

The defendants were,—*Robert Dering, Thomas Gybbon Monypenny; Robert Phillips Dearden Monypenny*, an infant, by *James Dearden*, his guardian; *James Isaac Monypenny; Phillips Monypenny; William Backhouse Monypenny; Charles Dawson; William David Cathcart Monypenny*, and *Thomas Phillips Blackwell Monypenny, Richard James Laud Monypenny, James Robert Blackwell Monypenny*, and *Phillips Howard Monypenny*, infants, by *John Cavell*, their guardian; *Susannah Monypenny; Peregrine Royds Dearden; John Corsley;* and *Elizabeth Charlotte*, now the wife of *Henry Doyle Sewell*.

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parish of *Rolvenden*, in the county of *Kent*, was, at the time of the making of his last will and testament hereinafter mentioned, and thenceforth up to and at the time of his death, seised in fee-simple of, or otherwise well entitled to, divers hereditaments and premises in the said county of *Kent*, respectively called *Maytham Hall* Estate, and *Lower Maytham Hall* Estate, all which said hereditaments and premises were of gavelkind tenure.

The said *James Monypenny*, being so seised or entitled as aforesaid, and being of sound and disposing mind, memory, and understanding, on the 11th of *February*, 1804, duly made and published his last will

or any part thereof, of E. Joddrell, the estate theretofore devised for the benefit of his said brothers and their issue should become and be and remain to the use of the next person entitled thereto, as they would have done if the person so succeeding to the Joddrell estate were actually dead.

By a codicil, the testator devised the same lands to his wife for life, and, after her decease, to the same uses as were declared by his will.

The testator's brother P. M., after the death of the widow, viz., in Michaelmas Term, 1827, suffered a recovery of the devised estates, to the use of the said P. M. in fee.

By a settlement on the marriage of R. J. M. (nephew of P. M.) with Susannah M., dated the 10th of June, 1835, P. M. charged the estate with a jointure of 300*l.* per annum to her in the event of her surviving them, P. M. and R. J. M.

In January, 1841, P. M. died without ever having had any issue, and having by his will devised the estates in question to his nephew R. J. M. for life, with remainder to his eldest son R. P. D. M. for life, remainder to his first and other sons successively in tail male, with divers remainders over.

In September, 1842, R. J. M. died, leaving his widow Susannah M. and R. P. D. M., his only son (then an infant), him surviving:—

Held,—first, that the testator's brother P. M. took an estate for life in remainder after the life estate of the widow:

Secondly, that T. G. M. took an estate for life in remainder after the life-estate of P. M., contingent on P. M. not leaving any issue at his decease, and determinable on his (T. G. M.'s) becoming entitled to the Joddrell estates; and also a remainder in tail general after the estate-tail of R. T. G. G. M. (son of T. G. M.):

Thirdly, that R. T. G. G. M. took a contingent remainder in tail male after the determination of the life-estate of his father T. G. M.:

Fourthly, that P. M. acquired no estate or interest under the recovery:

Fifthly, that Susannah M. took no estate or interest under the deed of the 10th of June, 1835:

Sixthly, that the co-heirs in gavelkind took a remainder in fee after the several estates above mentioned.

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and testament in writing, dated the 11th day of *February*, 1804, and duly executed and attested as by law was then required for passing real estates by devise, and thereby he devised the said *Maytham Hall* Estates as follows:—"I give and devise my said house called *Maytham Hall*, with all and every the appurtenances, to the uses, intents, and purposes following, that is to say, To the use, intent, and purpose that my brother *Phillips Monypenny* shall receive and take the rents, issues, and profits thereof for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of the first son of the body of the said *Phillips Monypenny* for and during the term of his natural life; and, from and immediately after his decease, to the use of the first son of the body of such first son, and the heirs male of his body; and, in default of such issue, to the use of all and every other son and sons of the body of my said brother *Phillips Monypenny*, severally and successively, according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue: and, in default of issue of the body of my said brother *Phillips Monypenny*, or in case of his not leaving any at his decease, to the use of my brother *Thomas Monypenny* for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of *Thomas Monypenny*, the eldest son of my said brother *Thomas Monypenny*, for and during the term of his natural life, without impeachment of waste; and, from and immediately after his decease, to the use of the first son of the body of the said *Thomas Monypenny*, son of my said brother *Thomas Monypenny*, and the heirs male of his body; and, in default of issue of the body of the said *Thomas Monypenny* the son, to the use of all and every other the son and sons of the body of my said

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Foster v. *The Earl of Romney* (*a*), *Denn* d. *Bridden* v. *Page* (*b*), *Hay* v. *The Earl of Coventry* (*c*), *Ellicombe* v. *Gompertz* (*d*), *Trickey* v. *Trickey* (*e*), *Morse* v. *Lord Ormonde* (*f*), *Driver* d. *Edgar* v. *Edgar* (*g*), *Fearne's* Cont. R. 10th edit. 204, 205, *Page* v. *Hayward* (*h*), *Fountain* v. *Gooch* (*i*), *Robinson* v. *Robinson* (*k*), *Doe* d. *Jones* v. *Davies* (*l*), *Chorlton* v. *Craven* (*m*). [*Maule*, J., referred to *Lord Dungannon* v. *Smith* (*n*) and *Doe* d. *Woodall* v. *Woodall* (*o*).]

Coote, for *Susannah Monypenny*, who claimed under the settlement of the 10th of *June*, 1835, upon the same grounds upon which *Robert Phillips Dearden Monypenny* claimed his life-estate, contended that *Phillips Monypenny* took an estate in tail *general*, — citing *Doe* d. *Burrin* v. *Charlton* (*p*) and *Reece* v. *Steel.* (*q*)

Willcock, for the heirs in gavelkind, contended that *Phillips Monypenny* took an estate for life only, with remainder to his eldest son for life; and that all the subsequent remainders were void for remoteness, — so that, on the decease of *Phillips Monypenny* in 1841, without issue, the co-heirs of the testator became entitled. He cited and observed upon the following authorities, — *Brudenell* v. *Elwes* (*r*), *Butler's* note to *Fearne's* Cont. R. 10th edit. 204, *Chapman* d. *Oliver*

(*a*) 11 *East*, 594.
(*b*) 11 *East*, 603, *n.*
(*c*) 3 *T. R.* 83.
(*d*) 3 *Mylne & Cr.* 127.
(*e*) 3 *Mylne & K.* 560.
(*f*) 1 *Russ.* 382.
(*g*) *Cowp.* 379.
(*h*) 2 *Salk.* 570.
(*i*) 4 *Bac. Abr.* 262.. *Legacies and Devises* (*D*).
(*k*) 11 *Beavan*, 371.
(*l*) 4 *B. & Ad.* 43.
(*m*) Cited in *Mellish* v. *Mellish*, 2 *B. & C.* 524.
(*n*) 12 *Clark & Fin.* 546., 1 *Drury & W.* 509.
(*o*) *Antè*, Vol. III. p. 349.
(*p*) 1 *M. & G.* 429., 1 *Scott, N. R.* 290.
(*q*) 2 *Simons*, 233.
(*r*) 7 *Ves.* 390.

v. *Brown* (a), *Wight* v. *Leigh* (b), *Doe* d. *Gallini* v. *Gallini* (c), *Doe* d. *Burrin* v. *Chorlton* (d), *Nicholl* v. *Nicholl* (e), *Langston* v. *Langston* (g), *Pitt* v. *Jackson* (h), *Smith* v. *Lord Camelford* (i), *Brudenell* v. *Elwes* (k), *Stackpoole* v. *Stackpoole* (l), *Somerville* v. *Lethbridge* (m), *Seaward* v. *Willock* (n), *Vanderplank* v. *King* (o), *Jesson* v. *Wright* (p), *Fetherston* v. *Fetherston* (q), *Colson* v. *Colson* (r), *Doe* d. *Blandford* v. *Applin* (s), *Blackborn* v. *Edgley* (t), *Reece* v. *Steel* (u), and *Chorlton* v. *Craven.* (x)

Bagshawe, for a person who claimed under one of the co-heirs in gavelkind, observed upon *Blackborn* v. *Edgley* (y) and *Vanderplank* v. *King* (z), and cited *Beard* v. *Westcott* (a).

Malins, in reply to *Willcock* and *Bagshaw,* referred to *Doe* d. *Comberbach* v. *Perryn* (b), *Lord Dungannon* v. *Smith* (c), *Mortimer* v. *West* (d), and *Brooke* v. *Turner.* (e)

(a) 3 *Burr.* 1626.
(b) 15 *Ves.* 564.
(c) 5 *B. & Ad.* 621, 3 *Ad. & E.* 340.
(d) 1 *M. & G.* 429., 1 *Scott, N. R.* 290.
(e) 2 *W. Bla.* 1159.
(g) 2 *Clark & Fin.* 194.
(h) 2 *Bro. C. C.* 51.
(i) 2 *Ves.* jun. 698. 711.
(k) 1 *East,* 450.
(l) 4 *Drury & W.* 320.
(m) 6 *T. R.* 213.
(n) 5 *East,* 198.
(o) 3 *Hare,* 1, 16.
(p) 2 *Bligh,* 1.
(q) 3 *Clark & Fin.* 67., 9 *Bligh, N. S.* 237.
(r) 2 *Stra.* 1125.
(s) 4 *T. R.* 82.
(t) 1 *P. Wms.* 605.
(u) 2 *Simons,* 233.
(x) Cited in *Mellish* v. *Mellish,* 2 *B. & C.* 524.
(y) 1 *P. Wms.* 605.
(z) 3 *Hare,* 1.
(a) 5 *Taunt.* 393, 5 *B. & Ald.* 801.
(b) 3 *T. R.* 484.
(c) 12 *Clark & Fin.* 546., 1 *Drury & W.* 509.
(d) 2 *Simons,* 274.
(e) 2 *N. C.* 422, 2 *Scott,* 611.

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MONYPENNY v. DERING.

Willcock observed upon *Mortimer* v. *West* and *Brooke* v. *Turner*.

Hodgson replied generally.

The following certificate was afterwards sent to Vice-Chancellor *Wigram*: —

Certificate.

"This case has been argued before us by counsel: we have considered it, and are of opinion as follows: —

"1. We are of opinion that *Phillips Monypenny* took an estate for life, in remainder after the life-estate of the widow, *Mary Monypenny*.

"2. We think that *Thomas Gybbon Monypenny* took an estate for life in remainder after the life-estate of *Phillips Monypenny*, contingent on *Phillips Monypenny* not leaving any issue at his decease, and determinable on *Thomas Gybbon Monypenny's* becoming entitled to the estates of *Elizabeth Joddrell*; and also a remainder in tail general after the estate-tail of *Robert Thomas Gybbon Gybbon Monypenny*.

"3. We think that *Robert Thomas Gybbon Gybbon Monypenny* took a contingent remainder in tail male after the determination of the life-estate of his father.

"4. We think that *Phillips Monypenny* acquired no estate or interest under the recovery.

"5. We think that *Susannah Monypenny* took no estate or interest under the said deed.

"6. We think the co-heirs in gavelkind took a remainder in fee after the several estates above mentioned.

"W. H. MAULE.
"C. CRESSWELL.
"E. V. WILLIAMS." (a)

Jan. 12, 1850.

(a) For the ultimate result of the case, in equity, see 7 *Hare*, 568, and (on appeal) 2 *De Gex, M'N. & G.*, 145. And see *Doe* d. *Evers* v. *Ward*, 18 Q. B. 197., *Doe* d. *Evers* v. *Challis*, 18 Q. B., 224. 231.

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SERRELL *v.* THE DERBYSHIRE, STAFFORDSHIRE, AND WORCESTERSHIRE JUNCTION RAILWAY COMPANY.

June 11.

A., *B.*, and *C.*, three directors of a railway company, in fraud of the company, drew a cheque upon the company's bankers in favour of one of their body. This cheque, though bearing the stamp usually impressed upon documents issued by the company, and countersigned by the secretary, did not upon the face of it purport to be drawn on behalf of the company, nor did the drawers describe themselves therein as directors: —Held, that the company were not liable for the amount to a bonâ fide holder for value.

Whether one who takes an overdue cheque takes it subject to its equities,—as in the case of an overdue bill of exchange.—*Quære.*

THIS was an action of assumpsit. The first count of the declaration was on a banker's cheque alleged to have been drawn by the defendants on Messrs. *Hankey*, payable to *Daniel Turton Johnson*, for the sum of 420*l.*, and by him transferred to the plaintiff, who sued as lawful bearer of the same.

There was also a count upon an account stated.

The defendants pleaded, to the first count,—first, that they did not make the cheque, *modo et formâ*,—secondly, that the cheque was not duly presented for payment,—thirdly, that the defendants had not due notice of the non-payment of the cheque,—fourthly, that the cheque was delivered to *Daniel Turton Johnson* by the directors of the *Derbyshire, Staffordshire, and Worcestershire Junction Railway Company*, for remuneration to him as a director of the said company, but that no determination as to such remuneration was ever come to by the said company at a general meeting thereof, and that the plaintiff took the cheque with notice of these facts,—fifthly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque with notice, alleging that he took it after the expiration of a reasonable time for presenting it for payment,—sixthly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque

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SERRELL v. THE DERBYSHIRE, &c., RAILWAY Co.

with notice, alleging that he was the bearer thereof without value,—seventhly, a similar plea to the fourth, but, instead of alleging that the plaintiff took the cheque with notice, alleging that he took it on certain terms and conditions which he had violated; and, to the last count,—eighthly, that they did not promise *modo et formâ.*

The plaintiff joined issue on the first, second, third, and eighth pleas, and replied *de injuriâ* to the fourth, fifth, sixth, and seventh.

The cause came on to be tried before *Wilde,* C. J., at the sittings in *London* after *Michaelmas* Term, 1848, when a verdict was found for the plaintiff for the amount of the cheque and interest, subject to the opinion of the court upon the following case,—power being reserved to the court to draw any inference or conclusion from the evidence which a jury might have drawn at *nisi prius,* and to consider the questions as to the admissibility of evidence as reserved at the trial:—

The following is a fac simile of the cheque, and of the stamp or mark thereon impressed; and it was agreed between the parties that the original cheque should, if required, be produced by the plaintiff to the court. *The cheque was not under the common seal of the company.*

"*London, August* 13, 1847.

"Messrs. *Hankey,*

"Pay *Daniel Turton Johnson,* Esq.,
or bearer, four hundred and twenty pounds.

"420*l.* 0*s.* 0*d.*

"*J. M. Mathew.*
"*W. King.*
"*E. J. Spiers.*

"*R. S. Mackenzie,* Sec."

The date stamp impressed upon the cheque was put upon all the documents of the company.

Upon the trial, on the part of the plaintiff, the act of parliament establishing the company was produced, and the same was to be considered as forming part of the case, and was to be referred to by either side upon the argument. The act received the Royal assent on the 2nd *July*, 1847.

The company had been in existence for the purpose of obtaining the act for about two years previously; and the parties whose names appear as the drawers of the cheque, as well as *Daniel Turton Johnson*, the payee, had been directors of the company during the whole of that time, and were such directors when the cheque was made. The act nominated five persons as the first five directors of the company, viz., *Sir John Foster Fitzgerald, Daniel Turton Johnson, William King, John Mee Mathew, and Edmund John Spiers*, and incorporates with it the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16.

The cheque mentioned in the declaration was produced; and, after the evidence hereafter mentioned, after proof of the handwriting of the three persons whose names were subscribed as drawers, and of *Mackenzie*, the secretary of the company, was read.

The evidence of the circumstances under which the cheque was drawn, was to the following effect: —

The three persons by whom the said cheque is drawn were three of the directors of the said company, as before mentioned.

First general meeting.

The first general meeting of the proprietors was held on the 29th of *December*, 1847.

Upon the 13th of *August*, 1847, a meeting took place of the five directors before mentioned, viz., *Sir John Foster Fitzgerald, Daniel Turton Johnson, William King, John Mee Mathew*, and *Edmund John Spiers;*

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and at that meeting a resolution was entered into that each attending director should receive remuneration for his services prior to the passing of the act; and a certain sum was agreed to be appropriated to the purpose of such remuneration. There were twenty-five directors. The number of meetings which had been held was ascertained, and the whole twenty-five directors counted as having attended such meetings; and the amount appropriated as the remuneration was then divided amongst the five directors who actually attended: and, by this arrangement, 600 guineas was appropriated to the chairman, and 400 guineas to each of the other four directors; and the cheque upon which this action is brought was one of those drawn under the above arrangement as the remuneration to be paid to *Daniel Turton Johnson*, one of the directors.

Edmund John Spiers, one of the five directors who attended the meeting at which the before mentioned resolution was adopted, objected to the proceeding altogether; but the chairman, who was also counsel for the company, advised the directors that the proceeding was perfectly legal; and the resolution was therefore adopted. *Spiers* then objected to the amount, and stated that he could produce instances of companies that were paying dividends, in which the remuneration to the directors was less than the amount then proposed to be allowed; but the other directors insisted that the proposed sum was inadequate as a compensation for the trouble they had taken. Some other allowances were also made to the directors for expenses. Four other cheques were drawn at the same time in favour of the four other directors. *Spiers* received his cheque, because he was told, that, if he did not, the other directors would divide the amount appropriated to him, and the company would gain nothing by his not taking it.

At the time the cheques were drawn, the company

had no funds to pay them, and it was agreed that the cheques should not be presented until the bankers should have funds wherewith to pay them; and that, whenever that time should come, all the cheques should be presented together, so that no one should have an unfair start.

A call was made prior to the general meeting which was held on the 29th of *December*, 1847. The previous payment of the call was a necessary qualification to attend such meeting.

Before the day of meeting, in order to qualify the directors to attend the meeting, credit was given to them as having paid the amount of the call due by them respectively; but in fact no such payments were made, but the amounts of such call were credited as a remuneration to the directors in respect of their services during the six months between the passing of the act and the date of the general meeting.

The cheque in question was presented for payment by the bankers of the plaintiff on his behalf on the 6th of *October*, 1847, when it was dishonoured; and notice of dishonour was given to the company on the 7th of *October*.

Evidence as to consideration.

The evidence on the part of the plaintiff, of the consideration given by him for the cheque, and in explanation of the delay that had been incurred in the presentment, was to the following effect,—that the cheque was seen in the plaintiff's possession, by his clerk, *the latter end of August*, 1847; that *Johnson*, the payee of the cheque, in *August*, requested the plaintiff not to present the cheque, saying to the effect that he had promised the directors it should not be presented. The witness could not say it was not mentioned in the plaintiff's presence that the cheque was given for remuneration to the directors.

A letter from *Johnson* to the plaintiff was read in

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evidence, stating that the plaintiff must not pay in the cheque until *Johnson* should tell him to do so; that *Johnson* would be at the board that day, and hoped an arrangement would be made for payment; that the calls were responded to slowly, but surely; that *Johnson* relied on the plaintiff keeping his cheque until he (*Johnson*) should have seen the directors.

The defendants' counsel objected to the reception of the evidence of the above mentioned communications between *Johnson* and the plaintiff: and the evidence was received subject to the objection.

An indenture of mortgage was given in evidence, dated the 5th of *November*, 1846, between the plaintiff and *Johnson*, reciting a loan of 2000*l.* by the plaintiff to *Johnson*, and assigning certain securities for such loan, and containing a covenant to pay the amount and interest on or before the 8th of *May*, 1847.

The several following cheques drawn by the plaintiff upon his bankers, payable to *Johnson*, were read in evidence:—

23rd *August*, 1847. Cheque for 69*l.* 10*s.* This cheque was received by *Johnson*, and paid by the plaintiffs' bankers.

18th *August*, 1847. Cheque for 120*l.* This cheque was proved to be in *Johnson's* possession on the 18th of *August*, 1847, and to have been paid by the plaintiffs' bankers.

26th *August*, 1847. Cheque for 100*l.* This cheque was also proved to have been given to *Johnson* on its date, and afterwards paid by the plaintiffs' bankers.

Evidence was also given of several requests by *Johnson* to the plaintiff not to present the cheque, accompanied by statements that it was the wish of the directors that the cheque should not be presented at present. This evidence was objected to, and received in manner before stated.

It was also proved that other moneys and cheques had passed between the plaintiff and *Johnson;* and applications by the plaintiff to *Johnson* for payment of the mortgage were proved to have been made before the receipt of the cheque in question.

It was proved by Messrs. *Hankey* & Co.'s clerk that the three persons who signed the cheque in question had no joint account at Messrs. *Hankey* & Co.'s; that the company had an account; *and that cheques to the extent of fifty or sixty, drawn by three of the directors of the company, had been paid by the bankers on account of the company.* (*a*) This evidence was also objected to, and received subject to the objection.

If the court should be of opinion that the plaintiff was entitled to recover, a verdict was to be entered for him for the amount of the cheque and interest: otherwise, a nonsuit was to be entered.

Byles, Serjt. (with whom was *Simon*), for the plaintiff. (*b*) The questions raised upon this case are,—

(*a*) These words were added to the case at the suggestion of the court.

(*b*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the cheque in question was the cheque of the company, and that the company were and are liable to the plaintiff as bearer:

"2. That the cheque is drawn in accordance with the 97th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16.), being signed by two directors of the company; and that it sufficiently appears on the face of the instrument that it was signed by the three individuals whose names are at the foot as directors, and not as individuals,—the stamp set against their names identifying them in that character, and the countersignature of the secretary also indicating that it was an act of the company:

"3. That, if there were any doubt as to this on the document itself, there was abundant evidence to satisfy the court or a jury that it was in fact a cheque of the company, and not of the individual parties whose names appeared at the foot:

"4. That delay in presentment could not *per se* affect the right of the plaintiff to sue the drawers, no damage having been sustained by the company by reason of such delay:

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first, whether the directors of this company had power to draw cheques at all,—secondly, whether this cheque purports to be the cheque of the company,—and, thirdly, whether the plaintiff was a holder for value, and without notice of any fraud or illegality. In the first place, it is submitted that the directors clearly had power to draw cheques. This depends upon the construction of the local act, 10 & 11 *Vict.* c. cx. The 1st section of that act incorporates with it the Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 16.), the Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 18.), and the Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 20.). The 4th section gives the names of the three persons who signed the cheque in question, as members of the company, and in *s.* 14 they are named *directors.* The payee of the cheque also was a director at the time of the passing of the special act. And by *s.* 54, the expenses incurred in the formation of the company are to constitute the first charge upon its funds. The powers of the directors are defined by *ss.* 90 and 91; the former of which enacts that "the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special act to be transacted by a general meeting of the company, but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially con-

"5. That there was no evidence to leave to the jury, and none from which the court could infer that the plaintiff took the cheque with a knowledge of the purpose for which it was drawn:

"6. That there was sufficient evidence of value given by the plaintiff."

vened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting." And s. 91 enacts, that, "except as otherwise provided by the special act, the following powers of the company, that is to say,—the choice and removal of the directors, except as hereinbefore mentioned, and the increasing or reducing their number where authorised by the special act, the choice of auditors, the determination as to the remuneration of the directors, auditors, treasurer, and secretary, the determination as to the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends,—shall be exercised only at a general meeting of the company." Then, the 95th section having impowered the directors to form committees, and to grant to such committees respectively power on behalf of the company to do any acts relating to the affairs of the company which the directors could lawfully do, and which they should from time to time think proper to intrust to them, the 97th section provides that "the power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows, that is to say,—With respect to any contract which, if made between private persons, would be by law required to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same;—With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the party to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such committee, or any two

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of them, or any two of the directors, and in the same manner may vary or discharge the same;—With respect to any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same: And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and, on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only." It appears from the special case, that Messrs. *Hankeys* were the bankers of the company, and that the company were in the habit of drawing cheques upon them, the course of business being that such cheques should be signed by three directors. Supposing the cheque in question to have been drawn for a proper purpose, the directors clearly would have power to draw it, such power being necessarily incident to their power to manage the affairs of the company. [*Hill, contrà*, observed that he would not dispute the power of the directors to draw cheques for the lawful purposes of the company, provided it were done under circumstances which would justify it.] The cheque is countersigned by the secretary of the company, and bears the seal of the company; and it is drawn upon the bankers of the company, with whom the three directors who signed the cheque had no account. There is nothing upon the face of the instrument to denote that it was not drawn on account of the ordinary business of the com-

pany. It appears that a mortgage-deed had been executed for a larger demand than the amount of the cheque. The plaintiff is a holder for value and without notice that the cheque was given for any illegal purpose; for he had a right to assume that the directors were acting within the limits of their authority. The most recent case upon the subject is that of *Rothschild* v. *Corney*. (*a*) There, the plaintiff was, by means of a fraud, induced to draw and pay away two cheques on his banker, amounting to 1330*l*. Six days after the date of the cheques, the defendants, acting *bonâ fide*, gave cash for them to a third person (who had not given value for them), presented the cheques, and obtained payment. In an action by the plaintiff to recover back this money, it was held that the cheques could not be treated as bills overdue, and therefore taken by the defendants at their peril, but that the real question in the cause was, whether they had acted *bonâ fide*, and *with due caution*. Lord *Tenterden* there says: "It cannot be laid down as matter of law, that a party taking a cheque after any fixed time from its date does so at his peril; and therefore the mere fact of the defendant's having taken the cheques six days after they bore date, from a person who had not given value for them, did not entitle the plaintiff to a verdict. It was, indeed, a circumstance to be taken into consideration by the jury in determining whether the defendants had taken the cheques under circumstances which ought to have excited the suspicions of prudent men." And *Littledale*, J., said: "It has been urged as matter of law, that a party taking a cheque overdue, has it with the same title, and no other, as the person from whom he receives it. But, although the rule of law certainly is so with respect to bills of exchange and promissory

(*a*) 9 *B. & C.* 388.

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notes, I think it cannot be applied to cheques." That case is still law, with this qualification, that the true question is whether the person receiving the instrument has become identified with the fraud, not whether he used "due caution" or not. The cheque was drawn in *August*, 1847. There was no evidence as to the time when it came into the plaintiff's hands; though it was seen in his possession in the month of *August*. The fact of the presentment being postponed until the 6th of *October* was no proof of fraud on the plaintiff's part; neither was the fact of the presentment having been postponed at the instance of the directors. A cheque may be presented at any time, provided the drawer sustains no loss from the delay in presenting it: *Serle* v. *Norton* (*a*), *Alexander* v. *Burchfield* (*b*), *Robinson* v. *Hawksford*. (*c*)

M. D. Hill (with whom was *Wordsworth*), *contrà*. (*d*) The main question is whether this was the cheque of

(*a*) 2 *M. & Rob.* 401.

(*b*) 3 *Scott, N. R.* 555., 1 *Carr. & M.* 75.

(*c*) 9 *Q. B.* 52.

(*d*) The points marked for argument on the part of the defendants were as follows:

"1. That the defendants are not the makers of the cheque upon which the plaintiff is suing:

"2. That the cheque not appearing on its face to have been made either by the defendants or on their behalf, the defendants cannot in law be liable as the makers of it, whether it was in fact made on their behalf and by their authority or not:

"3. That, even if it were open to the plaintiff to shew that the cheque was in fact made on behalf of the defendants and by their authority, so as to render them liable as the makers, still there is nothing in the special case to prove that the parties whose names appear on the cheque as the makers had the authority of the defendants to make it on their behalf; but that, on the contrary, it distinctly appears that they had not such authority, the cheque having been made for a purpose for which the directors had no authority to make it, except with the sanction of a general meeting of the company, which was never obtained:

"4. That the cheque was not presented for payment within a reasonable time:

"5. That the defendants

the company. A subordinate question is, whether, following the rule as to bills of exchange and promissory notes, the plaintiff is not precluded from recovering, on the ground that the cheque was received by him so long after its date, and its presentment postponed for an unreasonable period.

1. To entitle the three persons who signed this cheque to bind the company, they must have had authority to draw cheques on behalf of the company, and they must have *executed* that authority. It may be conceded that the directors had authority generally to draw cheques for the purposes of the company. But, had these three persons authority to draw this cheque? The mode in which, and the exceptions subject to which, the powers of the company are to be exercised by the directors, are defined by *ss.* 90 and 91 of the 8 & 9 *Vict. c.* 16.; and the 97th section regulates the making of contracts on behalf of the company. The facts disclosed by the case shew that the drawing of this cheque was the result of a gross conspiracy. It does not appear when the date stamp was put upon the cheque. But, assuming that it was there when the signatures were attached to the instrument, it makes no difference. In *Bult* v. *Morrell* (*a*), the plaintiffs declared on a bill of exchange by *R. P.*, directed to *A.*, *B.*, *C.*, *D.*, *E.*, and *F.*, and accepted by them. Pleas by *A.*, *B.*, and *C.*,—first, that *R. P.* did not make the bill in manner and form &c.,—secondly, that *A.*, *B.*, and *C.* did not

had not due notice of the non-payment of the cheque:

"6. That the cheque was made and delivered to *Daniel Turton Johnson* by the directors of the company under the circumstances and in the manner stated in the fourth, fifth, sixth, and seventh pleas; by reason whereof the said *Daniel Turton Johnson* could not himself have sued the defendants on the said cheque; and that the plaintiff, for one or other of the causes respectively stated in those pleas, is equally precluded from suing thereon."

(*a*) 12 *Ad. & E.* 745.

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accept in manner and form, &c. Issues thereon. Judgment by default against *D.*, *E.*, and *F.* The bill produced at the trial was drawn upon the directors of the Imperial Salt and Alkali Company, and accepted "for the company" by *D.* and *E.*, signing as directors. *F.* signed his name with theirs as "manager." All the defendants were shareholders, and all but *F.* were directors. The jury found that *F.*, as manager, was not an acceptor of the bill. It was not put to them to say (nor did counsel desire that they should be asked) whether or not *D.* and *E.* had authority to bind the company by acceptances. A verdict having been found for the plaintiffs, it was held, on a motion to enter a nonsuit, that *F.* was not in point of law liable as an acceptor, either by his having actually signed his name with those of *D.* and *E.*, or by their having accepted the bill as directors of a company in which he held shares; and that the plaintiff had failed on both issues. In *Beckham* v. *Knight* (*a*), this court held, that, although a dormant partner may be liable upon an implied contract entered into for the joint and equal benefit of the whole firm, the same liability does not arise upon an express contract. The court of *Exchequer*, however, held otherwise in *Beckham* v. *Drake* (*b*), and distinguished the case from the cases of bills of exchange and promissory notes. No extrinsic evidence is admissible for the purpose of adding a party to a bill of exchange: *Emly* v. *Lye.* (*c*) The parties who signed the cheque may be liable personally,—*Thomas* v. *Bishop* (*d*); *Siffkin* v. *Walker* (*e*); *Leadbitter* v. *Farrow* (*g*),—but they clearly had no power to

(*a*) 4 *N. C.* 243., 5 *Scott*, 619. And see *Beckham* v. *Knight*, 1 *Scott, N. R.* 675, 1 *M. & G.* 738.

(*b*) 9 *M. & W.* 79.

(*c*) 5 *East*, 7.

(*d*) 2 *Stra.* 955.

(*e*) 2 *Campb.* 308.

(*g*) 5 *M. & Selw.* 345.

bind the company. The fact of the special act being declared to be a "public act," does not make it notice to all the world that the persons therein named as directors are so: *Brett* v. *Beales.* (*a*) And, supposing it were notice, of what particular fact is it notice? That the directors had power to draw cheques on behalf and for the purposes of the company; not that this was a cheque drawn within the scope of their authority. Then, this cheque having been taken after its maturity, — for, a cheque is like a bill payable at sight, — the plaintiff took it subject to its equities in the hands of the person from whom he received it: *Bayley* on Bills, 6th edit. 165, 166.

Byles, Serjt., in reply. No doubt the directors were guilty of a gross fraud in misappropriating the funds of the company as they did: but that will not affect the title of the plaintiff, a *bonâ fide* holder for value. They are general agents to do all acts connected with the business of the company: and, in the absence of anything to shew they had a more limited authority than they assumed to exercise, the plaintiff was fairly entitled to suppose that they had not exceeded it: *Story* on Agency, §§ 17, 18, 19. The circumstance of the cheque having been taken after its date makes no difference. The holder is not *bound* to present it immediately. [*Cresswell*, J. In *Down* v. *Halling* (*b*), *Holroyd*, J., says: "A cheque is payable immediately, and the holder of it keeps it at his peril, and a person taking it after it is due, takes it also at his peril. Now, in this case, the cheque had been due five days at the time when it was taken by the defendants. That was a circumstance which ought to have excited their suspicion. I think that when the

(*a*) *M. & M.* 421.

(*b*) 4 *B. & C.* 330, 6 *D. & R.* 455.

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defendants took the cheque, more than a reasonable time for presenting it for payment had elapsed, and therefore they took it at their peril."] That was the case of a lost cheque; and it is not consistent with the subsequent case of *Rothschild* v. *Corney*. (a) [Maule, J. I think the two cases may be reconciled. There is no such strict rule of law as to cheques, that they must be presented promptly. But, where a reasonable time has passed, they stand in this respect upon the same footing as bills of exchange.]

MAULE, J. (b) In this case some questions of law and of fact are submitted to the court, and there are several issues joined between the parties: but, in the view the court is disposed to take of the case, it will not be necessary to enter very minutely into all of them. The first issue is, whether the cheque declared on was made by the defendants. In order to prove the affirmative of that issue, a paper is produced, signed by three persons who are proved to have been directors of the company, and countersigned by a person who is described as, and who we are told was, the secretary of the company. There was a written date upon the paper "*London, August* 13, 1847," and also a stamp which was impressed upon it opposite the names of the three persons who appear to be the drawers, bearing in the centre the same date, "*August* 13, 1847," and round the margin the words "*Derbyshire, Staffordshire, and Worcestershire Junction Railway Company.*" Our question is, whether that document upon the face of it purports to be the cheque of the company. It seems to me that it does not. It does not purport to be drawn by the company in its corporate character. The persons by whom it is drawn are, in fact, directors of the

(a) 9 *B. & C.* 388.
(b) *Wilde*, C.J., was engaged in the Court of Criminal Appeal

company; but they do not describe themselves as such. There is no mention whatever of the company, except in the stamp. Looking at the instrument alone, it does not profess to be a document by which the company purport to direct the bankers to pay money on their account. The directors whose names appear upon it do order the bankers to pay the sum therein mentioned; but, without the aid of extrinsic evidence, we cannot construe the instrument as the cheque or order of the company. If I saw this document out of court, I should be at a loss to know the meaning of the stamp. It is not a substitute for signature, like the cross of a markman. It is not usual or customary to sign a document in this circular form. It looks rather (if one were obliged to construe it) as if this were a document which had passed through the office of the company on such a day, and received the stamp as a mode of identifying or ear-marking it, — as is usual in some offices. But, looking at it without the aid of extrinsic evidence, or conjecture, I am utterly unable to say that this document purports to be a document made by the company. Now, the evidence is, that all documents issued by the company had this stamp upon them. If so, it must intimate something different from what is suggested on the part of the plaintiff; for, it must be put upon some documents that are required to be under the common seal of the company, and therefore cannot be intended to make it an instrument binding on the company. The other evidence from which it is insisted that we are to infer that this was the cheque of the company, was, "that cheques to the extent of fifty or sixty, drawn by three directors of the company, had been paid by the bankers on account of the company." The form of these, and by whom signed, does not appear. Even if they were in the same form, and signed by the same three directors, and countersigned by the

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same secretary, I do not think it would make any difference. Because the company have sanctioned the payment of some cheques when satisfied of the honesty of the transaction, it by no means follows that they are bound by this confessedly dishonest and disgraceful transaction. Undoubtedly there are cases in which a principal may be bound by the acts of his agent, although he has exceeded or not properly followed his authority. But, here, although the three directors who signed this cheque might have had authority to bind the company by contracts entered into on their behalf, they clearly had not authority to do what they have done here, viz. to cheat the company. Besides, the document does not purport to be made by any one, or by any set of persons, as agents for, or on behalf of, any one else. I therefore think the defendants are entitled to succeed upon the first issue. Probably this cheque may be considered as in the nature of an overdue bill, and, fraud being shewn, the *onus* is cast upon the plaintiff of shewing when he took it, and by what means he acquired title to it. It is, however, ununnecessary to decide that point upon the present occasion. I think there must be judgment of nonsuit.

CRESSWELL, J. I am of the same opinion. It appears that the parties who drew this cheque had no authority to do so: it was a gross fraud upon the company whose servants they were. Nor, indeed, do they upon the face of the instrument affect to bind the company. They sign the cheque with their own names, and do not profess to sign as agents or on behalf of the company: and I find nothing on the stamp to connect them with the company. The company, in fact, never had authorised any person to bind them by such an instrument. It cannot, therefore, in any shape be considered to be their cheque; and no person had any

right to take it as an instrument issued by them. In *Brooks* v. *Mitchell* (*a*), *Parke*, B., says: "If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily."

TALFOURD, J. I also am of opinion that there ought to be a nonsuit in this case. It is unnecessary for us to do more than consider the first issue, for that disposes of the whole case. I am clearly of opinion that the cheque was not the cheque of the company. If I were to hazard a conjecture as to what was the intention of the three persons who signed the cheque, I should say that they advisedly did an act of an equivocal character, in contemplation of the hour of peril, —hoping that the cheques would be paid without demur, but prepared, in the event of any inquiry arising, to say that they meant to bind themselves personally. There is no evidence that this cheque is drawn in a form that is either sanctioned by the company or warranted by the act of parliament. It is true, it is stated in the case that cheques drawn by three directors had been paid by the bankers on account of the company. But there is no statement as to what was the form of those cheques. And, supposing they were in the same form as the cheque in question, for anything that appears those were cheques properly so called, and fairly drawn for the purposes of the company. This cheque, however, and those which were drawn at the same time, were not so drawn; but were drawn in fraud of the company, and to be paid out of future assets: the case

(*a*) 9 *M.* & *W.* 15. 18.

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in terms so finds. It appears to me, therefore, that there is nothing in its form or its substance to shew that this cheque was the cheque of the company. It is enough to say that the plaintiff fails upon the first issue, and consequently that a nonsuit must be entered.

Judgment of nonsuit.

END OF TRINITY TERM.

AN

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TO

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I. *Form of.*

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his not leaving any at his decease, to the use of his brother *T. M.* for life, remainder to *T. M.*, the eldest son of *T. M.* for life, remainder to the first son of the body of *T. M.* the son, and the heirs male of his body; and in default of issue of the body of *T. M.* the son, to the use of all and every other the son and sons of the body of the testator's brother *T. M.*, for the like estates and interest severally and successively according to seniority of age; and, in failure of all such issue of the body of his said brother *T. M.*, to the use of him, his heirs and assigns, for ever: and the testator declared, that, if his said brothers, or either of them, or either of their issue, should become entitled to the estate, or any part thereof, of *E. Joddrell*, the estate theretofore devised for the benefit of his said brothers and their issue should become and be and remain to the use of the next person entitled thereto, as they would have done if the person so succeeding to the *Joddrell* estate were actually dead.

By a codicil, the testator devised the same lands to his wife for life, and, after her decease, to the same uses as were declared by his will.

The testator's brother *P. M.*, after the death of the widow, viz., in *Michaelmas* Term, 1827, suffered a recovery of the devised estates to the use of the said *P. M.* in fee.

By a settlement on the marriage of *R. J. M.* (nephew of *P. M.*) with *Susannah M.*, dated the 10th of *June*, 1835, *P. M.* charged the estate with a jointure of 300*l.* per annum to her in the event of her surviving them, *P. M.* and *R. J. M.*

In *January*, 1841, *P. M.* died without ever having had any issue, and having by his will devised the estates in question to his nephew *R. J. M.* for life, with remainder to his eldest son *R. P. D. M.* for life, remainder to his first and other sons successively in tail male, with divers remainders over.

In *September*, 1842, *R. J. M.* died, leaving his widow *Susannah M.* and *R. P. D. M.*, his only son (then an infant), him surviving:—Held,—first that the testator's brother *P. M.* took an estate for life in remainder after the life-estate of the widow:

Secondly, that *T. G. M.* took an estate for life in remainder after the life-estate of *P. M.*, contingent on *P. M.* not leaving any issue at his decease, and determinable on his (*T. G. M.*'s) becoming entitled to the *Joddrell* estates, and also a remainder in tail general after the estate-tail of *R. T. G. G. M.* (son of *T. G. M.*)

Thirdly, that *R. T. G. G. M.* took a contingent remainder in tail male after the determination of the life-estate of his father *T. G. M.*:

Fourthly, that *P. M.* acquired no estate or interest under the recovery:

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What constitutes a Partnership.

the said issue in due time according to the terms of the said order, or according to the course and practice of the said court, according to the said order, or any further order of any judge to be made in that behalf,"—"or, if *B.* should pay or cause to be paid to *A.* the sum of 200*l.*, or so much thereof as should be the value of the said goods, or such part of the same as might be found not to be the property of *B.*"

In an action upon the bond, against the sureties, the declaration, after setting out the condition, stated that the issue came on to be tried at a certain sitting, and that the jury were, with the consent of *A.* and *B.*, discharged from giving any verdict thereon; and that afterwards a further order was made, whereby it was ordered that *B.* should proceed to the trial of the issue at a certain other sitting, and that, in default thereof, his claim should be barred; and alleged for breach, that *B.* did not at the last-mentioned sitting, or at any other time after the making of the last-mentioned order, proceed to try, or try the issue, &c., nor pay *A.* the 200*l.*, or any part thereof.

The defendant *C.* pleaded, that, after the making of the first order, and before the making of the second order, *B.* did, in pursuance and performance of the condition of the bond, *proceed to try* the issue, according to the course and practice of the court and the order, and that the jury were discharged from giving a verdict by the consent of *A.* and *B.*, without any default on the part of, and without the consent of, *C.* and *D.*, or either of them.

The defendant *D.* demurred generally to the declaration:—

Held, that the declaration disclosed a sufficient breach, the meaning of the condition being that *B.* should actually cause the issue to be tried, and not being performed by the first proceeding to trial. *Williams* v. *Gray*, 730.

2. Held also, that the plea was bad, as raising an issue which was immaterial. *Ibid.*

III. *Immaterial Issue.*

The declaration stated that it was agreed between *A.* (the plaintiff) and *B.* (the defendant), that *A.*, *B.*, and *C.* should, at the expiration of a reasonable time, execute an indenture binding *C.* as an apprentice to *A.*, and that *B.* should pay to *A.* a premium of 60*l.*, —5*l.* on the execution of the indenture, and the residue by certain bills, to be drawn by the plaintiff and accepted by the defendant: averment, that, although a reasonable time for *B.* and *C.* to execute the indenture, and for *B.* to pay the 5*l.*, and to accept the bills, had elapsed, and although *A.* had always been ready and willing to execute such indenture, and to receive *C.* as such apprentice, and although *A.*, at the expiration of such reasonable time, requested

should be entered up thereon, but that no execution should issue upon such judgment until the 25th of *December*, 1848, and that the time for payment of the bill should be extended until that day; that the bill became due on the 22nd of *September*, 1847, and that the defendant was ready and willing to give and execute, and then tendered and offered to the plaintiffs, his warrant of attorney, pursuant to the agreement, and requested them to accept the same, and to extend the time of payment of the bill until the 25th of *December*, 1848, but that the plaintiffs refused and neglected so to do, and, in violation of the agreement, sought to to enforce payment of the bill; that the plaintiffs replied *de injuriâ* to such plea; and that the defendant obtained judgment in the said action. The plea then proceeded to aver the identity of the bill and the causes of action in both cases.

To this plea, the plaintiffs replied, that they *did* extend the time for payment of the bill until and after the said 25th of *December*, 1848, and that they had not, since the said recovery in the said plea mentioned, sought to enforce the payment of the bill, which still remained unpaid, and that the defendant had not given or executed to the plaintiffs a warrant of attorney:—

Held, on demurrer to the replication, that the plea, though containing unnecessary details of the pleadings in the former action, was a good answer to this action; and that the replication was bad. *Overton* v. *Harvey*, 324.

VIII. *New-Assignment.*

To trespass for breaking and entering the plaintiff's dwelling-house, ejecting and expelling the plaintiff and his family therefrom, and seizing his goods, the defendants pleaded, "as to the trespasses in and to the dwelling-house, and seizing and taking the goods," *liberum tenementum.* The plaintiff traversed the *liberum tenementum*, and new-assigned the *expulsion*:— Held, on demurrer, that the new-assignment was bad, the pleas justifying the expulsion, as well as the breaking and entering of the dwelling-house and the seizure of the goods. *Meriton* v. *Coombes*, 787.

IX. *Replication de Injuriâ.*

To an action by the payee against the acceptors of two bills of exchange, the defendants pleaded,— that the bills were accepted by them and one *B.*, and not by them alone; that, before the bills became due, and before the delivery thereof to the plaintiff, they were and continually from the time of their acceptance had been in the hands of the drawers for value, and had not been during all that time delivered over to the plaintiff by the drawers, and so con-

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accept their (the de-
and *B.*'s) dividend of
the pound on (amongst
the bills in question, and
the drawers bound them-
s to deliver to the defendants
B. within one month, re-
ing the said dividend on each
ceptance as it should be de-
vered up,—the defendants and
B. being at liberty to pay the said
composition on the said bills at
any time within one month, and
to tender the same at a certain
place; that a penalty of 500*l.* was
to be paid on default by either
side; that the 500*l.* were paid by
the defendants and *B.* to the
drawers in settlement of the said
accounts, and the composition duly
tendered; that the drawers refused
to accept the dividends tendered,
and failed to deliver up the ac-
ceptances, but afterwards, in fraud
and violation of the agreement,
delivered the bills declared on to
the plaintiff; and that the plaintiff
took, and held the bills with notice
of the premises:—

Held, that, assuming the plea to
contain a defence to the action,
—which the court inclined to
think it did not,—it was well
put in issue by the general repli-
cation *de injuriâ*.

To a similar plea, alleging the
agreement to have been made be-
tween the plaintiffs, through the
drawers as their agents, and the
defendants and *B.*, and averring
the payment of the 500*l.* and the
tender of the dividend to the
drawers, with notice to the plain-
tiff,—but not alleging that the
agreement to take the dividend
was accepted by the plaintiff in
satisfaction or substitution of the
contract on the bills,—the plain-
tiff replied, "that it was not agreed
by and between the plaintiff, by
and through the drawers as their
agents, and the defendants, in
manner and form as in the plea
alleged:"—

Held, that the plea was bad in
substance.

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good, *quære*.

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